Addressing the Inevitable: A Legal Assessment of Cross-Border Merger Control Among the ASEAN Member States in Light of the ASEAN Economic Community Framework, and Providing a Regional Merger Control Framework Therefor

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I. INTRODUCTION

While the future that awaits our region remains a bright and prosperous one, we need to think more of we than I. More of a family, more than just being a family, we need to think that we are a community. More than a community, not just a nation but a region.

— Hon. Alan Peter Cayetano, Secretary of Foreign Affairs, Grand Celebration of the 50th Anniversary of ASEAN, Manila[1]

1. Alan Peter Cayetano, Secretary of Foreign Affairs, *Love thy neighbor*, Remarks at the Grand Celebration of the 50th Anniversary of ASEAN/Closing of the ASEAN Ministerial Meeting and Related Meetings at the PICC Plenary Hall (Aug. 8, 2017) (transcript *available at* https://www.dfa.gov.ph/newsroom/dfa-releasesupdate/13558-remarks-by-hon-alan-peter-s-cayetano-secretary-of-foreign-affairs-on-the-occasion-of-the-grand-celebration-of-the-50th-anniversary-of-asean-closing-of-the-asean-ministerial-meeting-and-related-meetings (last accessed Nov. 30, 2019)).

What happens when a merger gets caught in different jurisdictions with differing opinions?

A. Background of the Study

1. The Dream of an ASEAN Single Market

A single market is synonymous with the realization of the free flow of goods, services, and capital.[2] It exists when barriers to the movement of goods, services, and capital have been eliminated between different geographical sources.[3] Thus, products, in theory, are of equal prices regardless of where they came from.[4]

The creation of the single market, or in the case of the Association of Southeast Asian Nations' (ASEAN), a single market and production base, has always been the goal of the ten-member organization.[5] The initial steps to create the single market and production base arose from finalizing the ASEAN Free Trade Area.[6] There, tariff barriers over goods have been eliminated among the original members of the ASEAN.[7] Afterwards, the Member States entered into the ASEAN Framework Agreement on Services which dealt with

2. Casey Lee & Yoshifumi Fukunaga, Competition Policy Challenges of Single Market and Production Base at 4, *available at* http://www.eria.org/ERIA-DP-2013-17.pdf (last accessed Nov. 30, 2019) (citing Peter J. Lloyd, *What is a Single Market? An Application to the Case of ASEAN*, 22 ASEAN ECON. BULL. 251, 252 (2005)).

3. *Id.*

4. *Id.* at 5.

5. RODOLFO C. SEVERINO, Southeast Asia Background Series No. 10: ASEAN 57 (2008). *See generally* Jose P. Tabbada & Sayeeda Bano, *Do Member Countries Benefit from Economic Integration? A Case Study of the ASEAN*, *in* THE ASEAN DRAMA: HALF A CENTURY AND STILL UNFOLDING 125 (Edna E.A. Co & Carlos C. Tabunda, Jr. eds., 2017).

6. SEVERINO, *supra* note 5, at 45.

7. *See generally* Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), *signed* Jan. 28, 1992, 31 I.L.M. 513.

the elimination of barriers and the liberalization of services among the ten members.[8]

The creation of the single market and production base was formally solidified with the ASEAN Charter entering into force.[9] There, the ASEAN Member States (AMS) agreed to make the creation of a single market and production base as one of the purposes for the creation of the region.[10]

The creation of the single market and production base, however, was qualified.[11] It was defined to have different characteristics.[12] These characteristics were fleshed out with the creation of the ASEAN Economic Community (AEC).[13] To create this economic community, the AMS agreed to create blueprints which serve to implement the single market and production base goal of the ASEAN.[14] The blueprints created goals for each AMS to abide by in order to realize the goal of regional economic integration.[15]

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8. *See generally* ASEAN Framework Agreement on Services, *signed* Dec. 15, 1995, 35 I.L.M. 1077.

9. Charter of the Association of Southeast Asian Nations, *signed* Nov. 20, 2007, 2624 U.N.T.S. 223 [hereinafter ASEAN Charter].

10. *Id.*

11. *Id.* at 6.

12. *Id.* art. 1 (5).

13. *See generally* ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ASEAN ECONOMIC COMMUNITY BLUEPRINT ¶¶ 8–26 (2008) [hereinafter ASEAN, AEC BLUEPRINT 2015].

14. *Id.*

15. *See* ASEAN, AEC BLUEPRINT 2015, *supra* note 13, ¶ 8 & ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ASEAN ECONOMIC COMMUNITY BLUEPRINT 2025 ¶ 3 (2015) [hereinafter ASEAN, BLUEPRINT 2025]. Under the first blueprint, the goals are: (1) single market and production base, (2) competitive economic region, (3) equitable economic development, and (4) integration into global economy. ASEAN, AEC BLUEPRINT 2015, *supra* note 13, ¶ 8. The goals provided in the second blueprint have evolved. The following are the ASEAN's objectives by 2025: (1) a highly integrated and cohesive economy, (2)

But before all of this happened, Filipino firms have already begun moving into the markets of other AMS for the purposes of expansion, diversification, and improving their supply chain.[16] One firm which took this opportunity was Universal Robina Corporation (URC).[17] Prior to the formalization of the AEC, URC has already penetrated the Vietnamese market with its famous ready-to-drink tea beverage called C2.[18] Apart from Vietnam, the company also has distribution channels in Singapore, Brunei, Laos, and Cambodia.[19] To complement these distribution channels, it also took the opportunity to set up manufacturing factories in Thailand, Malaysia, Indonesia, Myanmar, and Vietnam.[20] As a consequence of having manufacturing locations in the abovementioned countries, URC is currently "the market leader in Thailand's biscuits and wafers segments [and is one of] the top three players in [Malaysia's chocolates and Indonesia's snackfood segments]."[21]

URC is only one of the many Filipino firms which ventured beyond Philippine borders.[22] The expansion of firms ranges from pharmaceuticals

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competitive, innovative, and dynamic ASEAN, (3) enhanced connectivity and sectoral cooperation, (4) a resilient, inclusive, people-oriented, and people-centered ASEAN, and (5) a global ASEAN. ASEAN, BLUEPRINT 2025, *supra* note 15, ¶ 3.

16. Doris Dumlao-Abadilla, *Top Filipino firms building ASEAN empires*, PHIL. DAILY INQ., Dec. 23, 2015, *available at* http://business.inquirer.net/204522/top-filipino-firms-building-asean-empires (last accessed Nov. 30, 2019) [hereinafter Dumlao-Abadilla, *ASEAN empires*].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Doris Dumlao-Abadilla, *With unified ASEAN, M&A deals likely to rise*, PHIL. DAILY INQ., Jan. 11, 2016, *available at* http://business.inquirer.net/205326/unified-asean-ma-deals-likely-rise (last accessed Nov. 30, 2019) [hereinafter Dumlao-Abadilla, *M&A deals*].

22. Dumlao-Abadilla, *ASEAN empires*, *supra* note 16.

(e.g., United Laboratories), restaurant chains (e.g., Jollibee), and infrastructure (e.g., Manila Water).[23]

The trend of firms entering into the broader ASEAN regional market was predicted to rise due to the formal creation of the AEC in 2015.[24] This trend resulted from the prediction that more firms will enter into mergers and acquisitions deals.[25] The formation of the AEC encouraged Filipino firms to look beyond the Philippine market in order to find cheaper alternatives for sourcing raw materials for their products.[26]

The expansion of firms found in the ASEAN region is not isolated to benefit only Filipino corporations. Thailand's firms have been aggressive with outbound mergers and acquisitions in order to become more competitive in the Asia Pacific.[27] In fact, it was reported that the outbound activity of Thai firms constituted 1.3 percent of Thailand's gross domestic product in 2015.[28]

The trend of mergers in the ASEAN region is, however, not a unique story. Merger activity has always been considered as a means to expand and grow businesses.[29] Prior to the formalization of the ASEAN region through

23. Dumlao-Abadilla, *M&A deals*, *supra* note 21.

24. Dumlao-Abadilla, *ASEAN empires*, *supra* note 16.

25. Dumlao-Abadilla, *M&A deals*, *supra* note 21.

26. *Id.*

27. Chalida Ekvitthayavechnukul, M&As by Thai firm touch $5.6b driven by outbound transaction in ASEAN, *available at* https://www.dealstreetasia.com/stories/mas-by-thai-firms-touch-5-6b-driven-by-outbound-transactions-in-asean-16630 (last accessed Nov. 30, 2019).

28. Sucheera Pinijparakarn, *Thai M&As to continue in 2017*, THE NATION, Dec. 26, 2016, *available at* http://www.nationmultimedia.com/news/business/EconomyAndTourism/30302826 (last accessed Nov. 30, 2019).

29. DAVID GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 145 (2012).

the AEC, firms in other countries and regions have initiated waves of merger activity.[30]

2. The Problem with Too Much Merger Regimes

Merger activity, however, has its limits. Firms, which are too aggressive in consolidating market power, begin to restructure markets leading to high market concentration.[31] Consequentially, this aggressiveness gives smaller firms a harder time entering a highly concentrated market created by these mergers.[32]

To avoid possible market concentrations, States enacted antitrust or competition legislation with the goal of regulating anti-competitive mergers.[33] To further ensure that their national economies remain competitive, States have also begun to imbue their laws with "long-arm provisions" which serve as a means to regulate anti-competitive conduct outside its borders.[34]

The insertion of long-arm provisions, while helpful for the national economy, has created serious tensions between merger control regimes in the past. The Boeing/McDonnell Douglas and GE/Honeywell mergers illustrate the real consequences of having differing rulings due to the exercise of extraterritoriality.[35] Note that the merger regimes involved in these conflicts are the United States (US) and the European Union (EU) — two of the most developed merger control regimes in the world.[36]

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30. *See* William M. Hannay, *Transnational Competition Law Aspect of Mergers and Acquisitions*, 20 NW. J. INT'L L. & BUS. 287, 287 (2000).

31. Eleanor Fox, *Mergers in Global Market: GE/Honeywell and the Future of Merger*, 23 U. PA. J. INT'L ECON. L. 457, 467 (2014).

32. GERBER, *supra* note 29, at 133.

33. JÖRG PHILIPP TERHECHTE, INTERNATIONAL COMPETITION ENFORCEMENT LAW BETWEEN COOPERATION AND CONVERGENCE 13 (2011).

34. GERBER, *supra* note 29, at 60.

35. Kathryn Fugina, *Merger Control Review in the United States and the European Union: Working towards Conflict Resolution*, 26 NW. J. INT'L L. & BUS. 471, 481 (2006).

36. *Id.*

The Boeing/McDonnell Douglas merger involved two US corporations — the Boeing Company and the McDonnell Douglas Corporation.[37] The Federal Trade Commission (FTC) approved the merger stating that the merger would help strengthen and enhance competition in the US defense industry.[38]

Surprisingly, the European Commission (EC) held that it similarly had the power to exercise jurisdiction over the merger for reaching the required thresholds in its merger regulation rules.[39] In evaluating the merger, it did not take into account that Boeing did not have subsidiaries nor assets in the EU.[40] Rather, it primarily based its exercise of jurisdiction on the entire commercial jet industry market.[41] It held that the merger between Boeing and McDonnell Douglas would harm and damage competition in the EU Common Market.[42] Luckily, instead of blocking the merger, the EC allowed it to continue provided that Boeing will have to comply with the conditions imposed by the Commission.[43]

Compared to the former merger, the GE/Honeywell merger conflict did not end well. Here, the merging entities were also corporations originating from the US.[44] GE, in acquiring Honeywell, intended to make the latter its

37. *Id.*

38. *Id.*

39. *Id.* (citing David F. Feeney, *The European Commission's Extraterritorial Jurisdiction over Corporate Mergers*, 19 GA. ST. U. L. REV. 425, 465 (2002)).

40. *Id.*

41. Fugina, *supra* note 35, at 481 (citing J.D. Banks, *The Development of the Concept of Extraterritoriality Under European Merger Law and its Effectiveness Under the Merger Regulation Following the Boeing/McDonnell Douglas Decision 1997*, 19 EUR. COMPETITION L. REV. 306, 309 (1998)).

42. Fugina, *supra* note 35, at 482.

43. *Id.*

44. *Id. See also* Jeremy Grant & Damien J. Neven, The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict (A Case Study Published Online by the European Commission) at 37, *available at*

subsidiary.[45] The US Department of Justice (DOJ) approved the merger with certain conditions to be complied with by the parties.[46] It allowed the merger to proceed because it had the effect of creating efficiencies rather than reducing competition.[47]

The merger, however, was thwarted by the EC.[48] The act was considered to be the first time the EC blocked a merger that was previously approved by US authorities.[49] It ruled that the merger would harm competition in the Common Market.[50] It held that this merger would increase GE's dominant position in the global aerospace and industrial systems market.[51] For the merger to continue, the EC required divestitures which were beyond the conditions imposed by the US DOJ.[52] Thus, instead of complying with the conditions, GE chose not to continue with the merger.[53]

As a consequence of the failed merger, the US proclaimed that its merger control regime protects consumers while its EU counterpart served to protect competitors.[54] It also claimed that it had the only legitimate merger control

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https://ec.europa.eu/dgs/competition/economist/honeywell.pdf (last accessed Nov. 30, 2019) & Fox, *supra* note 31.

45. Grant & Neven, *supra* note 44, at 37.

46. Fugina, *supra* note 35, at 482 (citing Press Release *by* the United States Department of Justice Antitrust Division, *Justice Department Requires Divestitures in Merger Between General Electric and Honeywell* (May 2, 2001) (on file with Author)).

47. Fugina, *supra* note 35, at 483.

48. *Id.* at 482–83.

49. *Id.*

50. *Id.* at 482.

51. *Id.* at 483.

52. *Id.*

53. Fugina, *supra* note 35, at 483.

54. Fox, *supra* note 31, at 464 (citing Press Release *by* the United States Department of Justice, *Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition* (July 3, 2001) (on file with Author) & Charles A. James, *Reconciling Divergent Enforcement Policies: Where Do We Go From Here?*, *in* ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE

framework.[55] As a reaction to the claims, the EC argued that prices in the market would rise in the long term, if the merger was not stopped.[56]

The war of words, however, ended in cooperation.[57] The US and EU adopted a cooperation agreement which included a notification system to determine the interests of another party.[58] It allowed for the exchange of information between the two authorities through meetings of antitrust/competition officials.[59] It also created a positive comity arrangement allowing one party to request another to undertake competition enforcement over acts affecting the requesting party's interests.[60] Moreover, the EU also undertook to revise its dominance test to closely resemble the US test — creating the "substantial impeding of effective competition" test.[61]

LAW INSTITUTE 1 (Barry E. Hawk ed., 2002) (highlighting the differences between US and EU merger control regimes)).

55. Fox, *supra* note 31 at 463 (citing William J. Kolasky, Deputy Assistant Attorney General, U.S. Department of Justice Antitrust Division, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, Address at the George Mason University Symposium in Washington, DC (Nov. 9, 2001) (transcript *available at* https://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels (last accessed Nov. 30, 2019)).

56. Fox, *supra* note 31 at 464 (citing See Götz Drauz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law*, 25 FORDHAM INT'L L.J. 885 (2002)).

57. Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 282 (2001) (citing Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-CEC, Sept. 23, 1991, 2872 U.N.T.S. 81 [hereinafter U.S.-CEC Agreement]).

58. *Id.* at 282.

59. *Id.* (citing U.S.-CEC Agreement, *supra* note 57, art. II).

60. Stevens, *supra* note 57 at 282 (citing U.S.-CEC Agreement, *supra* note 57, art. V).

61. Stevens, *supra* note 57 at 296.

The use of extraterritoriality, particularly the use of the "effects" doctrine, can also create problems under international law.[62] It has been argued that principles under international law such as "(1) national sovereignty; (2) coordination; (3) procedural fairness; (4) non-discrimination; [and] (5) transparency" are infringed by the use of extraterritoriality in cross-border merger enforcement.[63] Similarly, the principle of coordination is infringed as multiple merger regimes lead to "contradictory, inconsistent, and cumulative [assessment]." [64] Lastly, the principles of procedural fairness, non-discrimination, and transparency are infringed when competition laws tend to protect and favor domestic firms and industries despite their infringement of laws.[65]

The conflicts illustrated have become more prevalent with the enactment of competition laws around the world.[66] Members of the ASEAN region are of no exception. Due to the creation of the AEC, the AMS have enacted competition laws to ensure that the playing field of competition in the region was not distorted.[67] Thus, it is important to ask how will the ASEAN, as an economic community, address these kinds of conflicts?

62. Jos van Doormal, Problems pertaining to the extraterritorial application of Merger Control: Towards an alternative approach as opposed to multi-jurisdiction merger review?: An analysis of the Merger Control system of the European Union in comparison with the USA, at 27 (2014) (unpublished LL.M thesis, Tilburg Law School) (on file with Author).

63. *Id.*

64. *Id.* at 28 (citing JOHN-REN CHEN, INTERNATIONAL INSTITUTIONS AND MULTINATIONAL ENTERPRISES: GLOBAL PLAYERS – GLOBAL MARKETS 74 (2004)).

65. *Id.* at 29.

66. GERBER, *supra* note 29, at 89.

67. *See generally* ASEAN, AEC BLUEPRINT 2015, *supra* note 13, ¶ 2.

B. Statement of the Problem

The creation of an economic community through regional integration has been one of the motivating factors which led to the creation of the ASEAN.[68] Regional integration meant that there was a need "[t]o create a single market and production base which ... [has been characterized as] highly competitive ... [to allow the] free flow of goods, services, ... [persons, and capital]."[69] As a consequence of the deadlines from the ASEAN Economic Blueprints, the AMS have enacted their respective competition laws to protect their economic interests from mergers within and without their borders (i.e., by imbuing their laws with long-arm provisions).

The creation of the AEC has also emphasized the creation of the single market and production base allowing businesses to flourish through intra-ASEAN trade.[70] Consequently, the creation of the single market also creates implications on the regulation of cross-border commercial activities.[71] While each respective Member State can protect their national economies from anti-competitive mergers, the question of protecting the competitiveness of the single market arises.

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68. *See generally* Declaration of ASEAN Concord II ¶ 1, *signed* Oct. 7, 2003, 43. I.L.M. 18 (2004) [hereinafter Bali Concord II].

69. ASEAN Charter, *supra* note 9, art. 1, ¶ 5.

70. Edson Guido, Philippines among top gainers in ASEAN trade, FDI inflows, *available at* https://news.abs-cbn.com/business/11/13/17/philippines-among-top-gainers-in-asean-trade-fdi-inflows (last accessed Nov. 30, 2019). The report provides —

> The Philippine trade situation closely followed the ASEAN trend through the years. However, in 2016, while global trade slowed down, the Philippines had a recovery both in terms of total trade and intra-ASEAN trade. Intra-ASEAN trade in the Philippines increased from [U.S.]$25.6 billion in 2015 to $30.9 billion in 2016, equivalent to 22[%] of total trade.

Id.

71. *See generally* Asian Development Bank, Regional Cooperation Can Help Asia Tackle Rising Cross Border Challenges, *available at* https://www.adb.org/news/regional-cooperation-can-help-asia-tackle-rising-cross-border-challenges (last accessed Nov. 30, 2019).

The exercise of extraterritorial jurisdiction over these mergers can create conflicts between and among the AMS (e.g., blocking and treble damages statutes), taking the region two steps backward from integration. Thus, it is imperative to develop a regional merger control framework which can better address regional and/or global effects to protect and foster the single market, a product of decades of hard work.

In order to establish a regional cross-border merger control framework, this Note shall answer the following issues: *first*, whether competition is an element of the AEC; and, *second*, whether the existence of concurrent jurisdictions due to the exercise of extraterritorial jurisdiction is consistent with the ASEAN single market framework.

C. Significance of the Study

Cross-border transactions (i.e., cross-border mergers) have become prevalent in the last decade.[72] The issue of conflicts of jurisdiction with regard to merger control cases, consequently, has long been the ire of both competition authorities as well as businesses who wish to grow and enter into new markets.[73] This issue has since been problematized by regional economic blocs which have created competition frameworks prior to the ASEAN's implementation of its Charter through the AEC Blueprints.[74]

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72. Nicolas Coeurdacier, et al., Cross-border Mergers and Acquisitions: Financial and Institutional Forces (A Working Paper Published Online by the European Central Bank) at 7, *available at* https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1018.pdf?f24c4b92d0ab320af77538bf255713bc (last accessed Nov. 30, 2019).

73. Eleanor M. Fox, Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus, *available at* https://www.brookings.edu/articles/antitrust-regulation-across-national-borders-the-united-states-of-boeing-versus-the-european-union-of-airbus (last accessed Nov. 30, 2019). It should be noted, however, that this conflict existed between countries who are not members of a regional community.

74. Maher Dabbah, Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies (A Background Note Published by the Organisation for Economic Co-operation and Development) at 4, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2011)1&doclanguage=en (last accessed Nov. 30, 2019).

The problem of jurisdictional conflicts could not be just a figment of an ASEAN and non-ASEAN firm's imagination considering the recent enactment of competition laws in the various AMS in order to abide by the AEC Blueprint deadline. Imagine URC or any Filipino firm wishing to expand its reach in the ASEAN Region. URC, in order to consolidate regional dominance and diversify its beverage selection, acquires a smaller Philippine-based beverage corporation (Firm A). Upon filing a voluntary notification, the Philippine Competition Commission (PCC) has cleared the transaction as not having any substantial effects on the Philippine beverage market.

URC and Firm A also have subsidiaries located in the territories of other AMS. Contrary to the opinion of the PCC, the competition authorities of these AMS have concluded that the acquisition of Firm A by URC is anti-competitive as it increases URC's market share and concentration in each respective AMS leading to possible abuse of dominance. What will happen to the subsidiaries of URC and Firm A? Are Firm A's subsidiaries considered acquired? Is the acquisition limited only between URC and Firm A?

Now, imagine the same transaction occurring, but, in the present case, neither URC nor Firm A have subsidiaries in any AMS. URC and Firm A, however, are exporting their products to another AMS. As a response, the competition authorities of the AMS found that the transaction created a highly concentrated market in the beverage industry of each respective AMS. Thus, they deemed the transaction anti-competitive. Does this mean that, within the importing AMS, URC's acquisition of Firm A did not take effect?

In another case, imagine URC acquiring Firm B, a small Vietnamese firm, to expand and diversify its product portfolio. The transaction was only notified with the PCC as it did not reach the threshold limits of the Vietnam Competition Law. The Vietnam Competition Commission (VCC), however, found the transaction to be anti-competitive while the PCC had the contrary opinion. Does this mean that, in Vietnam, the transaction did not continue and thus, the two entities remain separate from each other while the transaction proceeds on Philippine soil?

Lastly, imagine a global merger occurring between parent companies (e.g., Bayer/Monsanto Merger)[75] not located in any AMS. The merging firms have subsidiaries located in all ten AMS. Upon notification, all ten AMS have differing opinions regarding the merger. Five AMS authorities gave clearance for the merger to proceed. Three AMS authorities prohibited the merger because of the merged entities dominance in their domestic markets. The last two AMS authorities prohibited the merger under a different ground — the merged entity may result to the substantial lessening of competition in their respective national markets. In this scenario, what would happen to the merger in the ASEAN region? Does this mean that the merged entity can only operate in those five AMS? Will the merging entities need to divest in the remaining States? Or will they totally divest in the entire region?

The scenarios given are only a small fragment of the endless permutations which can arise with the current competition framework found in the ASEAN. While it is conceded that each AMS has the capacity to enforce their own competition laws in their respective territories, the problem of possible conflicts between laws and rulings may continue to exist, absent a proper framework. Compared to the other regional economic blocs which have created measures to address this concern prior to total economic integration, the AMS, through the AEC, developed competition laws not having considered the possible permutations shown.

Due to the absence of any governing body which can address regional competition concerns, there is a great possibility that there would be conflicts of jurisdiction issues. Unlike the initial relationship between the US and the EU, the AMS cannot afford to have conflicts of issuances and findings as it would diminish the viability of the ASEAN as a single market and as a haven for intra-ASEAN and inter-ASEAN Foreign Direct Investments.

D. Objectives and Methodology

For the purposes of this Note, it shall aim to discuss the following:

(1) To assess the current framework on merger control in the ASEAN in light of the single market framework;

75. *See generally* Bayer, Monsanto Acquisition: Frequently Asked Supplier Questions on Monsanto Acquisition, *available at* https://www.bayer.com/en/monsanto-acquisition.aspx (last accessed Nov. 30, 2019).

(2) To understand the consequences of conflicts of jurisdiction in a single market;

(3) To analyze the current approach in conflicts of jurisdiction in competition cases;

(4) To establish the relationship between competition and the single market and production base;

(5) To analyze the effect of conflicts of jurisdiction vis-à-vis the concept of a single market and production base;

(6) To reconcile the different approaches of addressing conflicts of jurisdiction in an economic region; and

(7) To recommend a regional merger control framework to address merger control-related conflicts of jurisdiction in the ASEAN region.

To achieve the set objectives, the Author shall use a qualitative and comparative approach. In assessing the AMS merger control regulations, the second Chapter shall particularly use the applicable laws as legislated in each AMS to illustrate the differences in merger control regimes;[76] and use the ASEAN Regional Guidelines on Competition Law and Policy [77] to supplement the definition of concepts. The Author shall also refer to the US and EU merger control regimes in discussing the concepts of anti-competitive mergers, the relevant market, and market control.[78]

The Chapter on the ASEAN Competition Framework shall make reference to the different ASEAN documents with respect to the elimination of trade barriers as well as the discussion of the ASEAN Competition Framework. The Chapter on the exercise of extraterritorial jurisdiction in competition law shall use both primary and secondary sources to discuss the concepts of sovereignty and jurisdiction. On the other hand, the discussion on

76. However, for Cambodia, the Author shall use its draft competition law.

77. ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY (2010) [hereinafter ASEAN, REGIONAL GUIDELINES].

78. *Id.* The Guidelines refer to the best practices of other competition authorities as a reference. *Id.* at ii, ¶ 2.

the different provisions regarding the exercise of extraterritorial jurisdiction in the ASEAN shall refer to enacted legislation and secondary sources. With respect to the discussion of the modes of exercising extraterritorial jurisdiction, this Chapter shall also refer to the US and EU standards as indicative references.

In discussing the analysis, the Author shall refer to the EU regulation and jurisprudence to explain and relate competition and the principle of free flow of goods, services, and investments. The use of treaty interpretation shall then be used to assess and compare the EU framework with the ASEAN framework. On the issue of conflicts of jurisdiction and its compatibility with the principle of free flow of goods, services, and investments, the Author shall use different scenarios to assess the applicability of conflicts rules in AMS' current competition legislation.

II. MERGER CONTROL

As discussed in the Introduction, mergers, while helpful in the economy, have dire consequences. This Chapter shall illustrate the concept of mergers in the context of competition law and how mergers are determined to be anti-competitive. In this Chapter, the Author shall also illustrate the current practices of each AMS in regulating prohibited mergers through an understanding of how each AMS defines what a merger is.

A. Mergers under Competition Law

The ASEAN Regional Guidelines on Competition Policy (Regional Guidelines) define a merger as a

> [situation] where two or more undertakings, previously independent of one another, join together. This definition includes transactions whereby two companies legally merge into one ('mergers'), one firm takes sole control of the whole or part of another ('acquisitions' or 'takeovers'), two or more firms acquire joint control over another firm ('joint ventures') and other transactions, whereby one or more undertakings acquire control over one or more undertakings, such as interlocking directorates.[79]

The definition from the Regional Guidelines begins with a general definition of "two or more undertakings ... [joining] together."[80] It then

79. *Id.* ¶ 3.4.1.1.

80. *Id.*

provides for the following transactions covered by the definition: mergers, acquisitions or takeovers, joint ventures, and interlocking directorates.[81] On the other hand, the following are the definition of mergers in the respective competition laws of each AMS:

ASEAN Member State	Definition of Merger
(1) Brunei (The Brunei Competition Order of 2015)	The law does not provide for any distinction on any classification of mergers.[82]
(2) Cambodia (The Draft Law on Competition of Cambodia)	The law refers to prohibited mergers as unlawful business combinations.[83]

81. *Id.*

82. *See* An Order to promote and protect competition in markets in Brunei Darussalam, to promote economic efficiency, economic development and consumer welfare; and to provide for the functions and powers of the Competition Commission of Brunei Darussalam and to provide for matters connected therewith [Brunei Competition Order, 2015], § 23 (2015) (Brunei). The law provides that there is a merger if

    (a) two or more undertakings, previously independent of one another, merge;

    (b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

    (c) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

    Brunei Competition Order, 2015, § 23.

83. Draft Law on Competition of Cambodia, ch. III, § 1, arts. 11-12 (2018) (Cambodia). Articles 11 and 12 pertain to unlawful horizontal agreements and unlawful vertical agreements, respectively. *Id.*

(3) Indonesia (The Law of the Republic of Indonesia Number 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition)	The law refers to mergers as mergers, consolidations, and acquisitions "which may cause monopolistic practices and[/]or unfair business competition."[84]
(4) Laos (Law on Competition, No. 60/NA)	The law defines the following activities as a combination: "merger, acquisition or transfer of the enterprises, and a joint venture."[85]
(5) Malaysia (Malaysian Aviation Commission Act)	For the purposes of the Act, a merger occurs through the existence of an actual merger, an acquisition, or a joint venture.[86]

84. Law of the Republic of Indonesia Number 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition [Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition], pt. 4, art. 28 (1999) (Indon.). While they do not fall under the provisions of prohibited mergers, interlocking directorates, and share ownership are also prohibited by the law. *Id.* arts. 26-27.

85. Law on Competition, No. 60/NA, art. 37 (2015) (Laos).

86. An Act to establish the Malaysian Aviation Commission to regulate economic matters relating to the civil aviation industry and to provide for its functions and powers and related matters [Malaysian Aviation Commission Act], Laws of Malaysia Act 771, § 54 (2) (2015) (Malay.).

Malaysia has not implemented merger control in its general competition act. *See* An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith [Competition Act 2010], Laws of Malaysia Act 712, (2010) (Malay.).

The lack of general merger control does not mean that Malaysia has failed to regulate mergers. Shanthi Kandia, Malaysia (An Article Published by the Merger Control Review) *available at* https://thelawreviews.co.uk/edition/the-merger-control-review-edition-10/1197364/malaysia (last accessed Nov. 30, 2019).

(6) Myanmar (The Pyidaungsu Hluttaw Law No. 9)	A merger under Myanmar's Competition Law is called a collaboration among businesses, [87] which covers mergers, consolidations, acquisition of businesses, and joint ventures.[88]
(7) Philippines (Philippine Competition Act)	The law defines a merger as "the joining of two (2) or more entities into an existing entity or to form a new entity ... ."[89]
(8) Singapore (Competition Act)	The law provides for three instances of what is considered a merger: mergers, consolidation, and acquisitions.[90]
(9) Thailand (Competition Act B.E. 2542)	The law covers mergers, acquisitions, and acquisitions which may result in a monopoly or unfair competition as defined by the law.[91]

Under the Malaysian Aviation Commission Act, mergers in the aviation industry are currently under the jurisdiction of the Malaysian Aviation Commission. Malaysian Aviation Commission Act, § 17 (1) (a) (ii).

87. The Pyidaungsu Hluttaw Law No. 9 [The Competition Law], ch. X (2015) (Myan.).

88. *Id.* § 30. The law also empowers the Commission to expand the coverage of what a collaboration among businesses may be. *Id.* § 30 (e).

89. Philippine Competition Commission, Rules and Regulations Implementing the Philippine Competition Act, Republic Act No. 10667, rule 2 (k). The definition can be narrowed down into mergers and acquisitions. *Id.* rule 2 (a). It also covers the conduct of joint ventures. *Id.* rule 2 (k).

90. Competition Act (Chapter 50 B), § 54 (2) (2006) (Sing.). The law also considers joint ventures in identifying what a prohibited merger is. *Id.* § 54 (5).

91. Competition Act B.E. 2542, § 26 (1999) (Thai.) (repealed 2017). It is interesting to note that mergers are classified as horizontal, vertical, and conglomerate mergers. *Id.* § 26 (1).

(10) Vietnam (Law No. 27-2004-QH11)	The Act covers the following conduct: mergers, consolidations, acquisitions, and joint ventures.[92]

B. Classification of Mergers

The Regional Guidelines provide for a general definition of what a merger is.[93] It is defined as a transaction combining two entities into one.[94] From the definition, it can be inferred that the coverage of a merger is left to the discretion of a respective AMS.[95] This observation is understandable given the non-binding character of the Regional Guidelines.[96] Based from the discussion in this Section, the consideration of how a merger is structured is unclear, with the exception of Thailand.

Being the most detailed with regard to the scope of what a merger is, this Note shall discuss Thailand's definition of mergers as the law covers the following mergers: horizontal, vertical, and conglomerate mergers.[97] Thus, for the purposes of this Chapter, mergers shall be differentiated between horizontal and non-horizontal mergers. It shall also include the definition of what an acquisition and joint venture is, respectively.

Horizontal mergers refer to mergers which "[involve] potential or actual competitors ... [within a relevant market]."[98] On the other hand, *non-*

92. Law No. 27-2004-QH11 [Law on Competition], art. 16 (2005) (Viet.). Prohibited mergers in Vietnam are better known as economic concentrations. *Id*. The list of covered conduct may be expanded by law as contemplated by the law. *Id*. art. 16 (5).

93. ASEAN, REGIONAL GUIDELINES , *supra* note 77, ¶ 3.4.1.1.

94. *Id*.

95. *See* ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶ 3.4.1.1.

96. *Id*. at 1.2.2.

97. Competition Act B.E. 2542, § 26 (repealed 2017).

98. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines at 1, *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (last accessed Nov. 30, 2019).

horizontal mergers include vertical and conglomerate mergers.[99] *Vertical mergers* are mergers by firms who are part of "different levels of the supply chain. [e.g., a merger between] ... a manufacturer ... [and a distributor] ..."[100] *Conglomerate mergers*, on the other hand, refer to mergers of firms who are not related based on a supply chain.[101]

Aside from mergers, the Regional Guidelines also include acquisitions and joint ventures within the scope of merger control.[102] *Acquisitions* are defined by the Regional Guidelines as transactions wherein one company takes complete control of the whole or part of another company.[103] On the other hand, *joint ventures* are defined as transactions where two or more firms acquire joint control over another firm.[104]

C. Prohibited Mergers

Prohibited mergers have been recommended by the ASEAN Expert Group on Competition (AEGC) to cover mergers that "lead to the substantial lessening of competition or would significantly impede effective competition in the relevant market or a substantial part of it."[105] In understanding what is considered "substantial lessening of competition" or "significantly impede effective competition[,]" the Author recommends looking into international

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99. Thomas Rosch, The Challenge of Non-Horizontal Merger Enforcement, Federal Trade Commission (A Paper Published Online by the Federal Trade Commission) at 4, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger_1.pdf (last accessed Nov. 30, 2019).

100. Guidelines on the assessment of non-horizontal merger under the Council Regulation on the control of concentrations between undertakings, ¶ 4, 2008 O.J. (C 265) 6.

101. *Id.* ¶ 5.

102. ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶ 3.4.1.1.

103. *Id.*

104. *Id.*

105. *Id.* ¶ 3.4.1.

practices which created these standards recognized as a useful reference by the Guidelines.

The requirement of substantial lessening of competition leading to a prohibited merger can be traced back to the US' antitrust practice. The origins of the substantial lessening of competition (SLC) test can be traced from the Clayton Act.[106] The test dictates that a merger is considered anti-competitive when prices within a specific relevant market would likely rise if the merger is completed.[107]

On the other hand, the significantly impede effective competition (SIEC) test was developed by the EU as a replacement to its dominance test. The SIEC test focuses on determining whether the effects of a merger may result in the "creation or strengthening of a dominant position ... [.]"[108] This test, thus, veers away from the necessary condition of a creation of dominance as found in the previous test.[109] Instead, the test looks into the significant increase in price which may arise from the potential merger.[110]

At first glance, it looks like the tests are different because of how the Guidelines based its standard in determining whether a merger is anti-

106. Clayton Act § 7, 15 U.S.C. § 18 (1996) (as amended).

107. Organisation of Economic Co-operation and Development, The Standard for Merger Review, with a Particular Emphasis on Country Experience with the Change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test (Unclassified Document DAF/COMP (2009) 21 Comprising Proceedings of a Roundtable Discussion held by the Competition Committee) at 7, *available at* http://www.oecd.org/daf/competition/mergers/45247537.pdf (last accessed Nov. 30, 2019).

108. Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Control Regulation), art. 2 (3), 2004 O.J.L. 24 (EU) [hereinafter EUMR].

109. Nicholas Levy, EU Merger Control: A Brief History (A Paper Published Online by Cleary Gottlieb Steen & Hamilton) at 4, *available at* https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/eu-merger-control---a-brief-history.pdf (last accessed Nov. 30, 2019).

110. *Id.*

competitive. On one hand, the SLC test only refers to the effects of the merger on the increase of price in the market.[111] On the other hand, the SIEC test still goes back to the possibility of dominance, while shifting to the determination of effects of the merger.[112] The Author notes that the difference was never contemplated by the AEGC as the use of SIEC test may also refer merely to the existence of a change in the prices due to the merger.

Thus, in determining whether a merger falls under the SLC test or the SIEC test, it is necessary to discuss the following: (1) Relevant Market; (2) Market Power and Concentration; and (3) Effects.

1. Relevant Market

"Determination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes Competition Law."[113] According to the Regional Guidelines, a *relevant market* refers to "[a] product range and the geographic area where competition takes place between undertaking."[114] From the definition, a relevant market is split into two: (1) the relevant product market and (2) the relevant geographic area.[115]

In determining whether there is a substantial lessening of competition or significant impeding of effective competition,[116] it is necessary to determine what the relevant product market and the relevant geographic market are.

The Regional Guidelines provide for the means of determining the *relevant product market* through "[identifying] the range of products or services which are regarded as interchangeable or substitutable by the customers, by reason of their characteristics, price and intended use."[117] The Regional

111. Organization of Economic Co-operation and Development, *supra* note 107, at 7.

112. Levy, *supra* note 109, at 4.

113. JOHN J. FLYNN, ET AL., FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 138 (2017) (unpublished draft).

114. ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶ 3.2.3.2.

115. *Id.*

116. *Id.* ¶ 3.4.1.

117. *Id.* ¶ 3.2.3.3.

Guidelines seem to be silent with regard to the means of determining whether a product or service is interchangeable or substitutable based on its characteristics, price, and end use of a product. In the absence of such tools in the guidelines, it is necessary that this Note refers to the tools currently used by mature antitrust regimes such as the US.

The US Supreme Court has developed the following tools in determining the relevant product market in antitrust cases:[118]

(1) the Demand Side Substitutability test;[119]

(2) the Hypothetical Monopolist test;[120]

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118. FLYNN, ET AL., *supra* note 113, at 23-27.

119. The demand side substitutability test was first created by the U.S. Supreme Court in the case of *United States v. E.I. Du Pont De Nemous & Co.* The Court ruled that a relevant product market is determined when the products in the market are "commodities reasonably interchangeable by consumers for the same purpose." United States v. E.I. Du Pont De Nemous & Co., 351 U.S. 377, 395 (1956). To elaborate on the test, the Court held that the determination of the market of a certain commodity depends on "how different from one another are the offered commodities in character or use, or how far buyers will go to substitute one commodity over the other." *Id.*

120. The Hypothetical Monopolist Test or the Small but Significant and Non-Transitory Increase in Price (SSNIP) test was formulated by the U.S. Department of Justice and the Federal Trade Commission as an aid for companies who plan to merge. FLYNN, ET AL., *supra* note 113, at 24.

The Horizontal Merger Guidelines illustrate the SSNIP test as follows:

> [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, [ ] was the only present and future seller of those products[,] ... likely would impose at least a small amount but significant and non-transitory increase in price ... on at least one product in the market, including at least one product sold by one of the merging firms.

U.S. Department of Justice & Federal Trade Commission, *supra* note 98, ¶ 4.1.1.

For the sake of brevity, the SSNIP test requires that a product market should contain enough substitute products in order to maintain a post-merger market power exceeding that of a pre-merger market power. *Id.*

(3) Submarkets test;[121] and

(4) Supply Side Substitutability test.[122]

On the other hand, the Regional Guidelines define the *relevant geographic market* as

> the area in which the enterprises concerned are involved in the supply and demand of the relevant products or services, which customers view as interchangeable or substitutable, and in which the conditions of competition are sufficiently homogeneous and can be distinguished from those of [neighboring] areas because the conditions of competition are appreciably different than in those areas.[123]

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121. The submarkets test was first formulated in *Brown Shoe Co. v. United States* involving a vertical merger. Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1926). The Court held that the outer boundaries of a product market can be ascertained through the cross-elasticity of demand or the reasonable interchangeability of use between the product itself and its substitutes. *Id.*

Despite the existence of a product market, the Court acknowledged the existence of submarkets within a broad market for antitrust purposes. In determining the relevant product market of a submarket, the Court found it necessary to examine the following "practical indicia [which include the] industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to product changes, and specialized vendors." *Id.* at 325.

122. As the opposite of the *Du Pont* test, the supply side substitutability test focuses on the elasticity of supply — thereby tasking the court to determine whether producers of dissimilar products will change their production to better compete as well as increase the price above competition. FLYNN, ET AL., *supra* note 113, at 26 & ELINER ELHAUGE, RESEARCH HANDBOOK ON THE ECONOMIC OF ANTITRUST LAW 69 (2012).

123. ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶ 3.2.3.4. The Regional Guidelines further clarify that the relevant geographic market of a product may be national, regional, or global depending on the product examined. Other factors which a competition authority may consider include "the nature of alternatives in the supply of the product, and the presence or absence of specific factors (e.g., transportation costs, tariffs[,] or other regulatory barriers and measures)." *Id.*

The Guidelines similarly acknowledge that it is possible for a firm to operate in a number of geographic markets, despite producing only one product.[124] However, it should be noted that the definition of a relevant geographic market in this Chapter is only provided in the Guidelines' discussion of anti-competitive agreements. Hence, there is no exact definition or guideline in determining a relevant geographic market in a prohibited merger. Again, it is thus important to refer back to international practice in determining how to find the relevant geographic market of a merger.

Similar to the determination of the relevant product market, the US DOJ and the FTC use the hypothetical monopolist or the Small but Significant and Non-Transitory Increase in Price (SSNIP) test in a certain location where a merger has caused an increase of price.[125] The location to be examined under the SSNIP test also includes at least one location where a merging firm can be found.[126]

2. Market Concentration

One of the useful determinants of a merger's anti-competitive effects is through the change of market concentration due to the merger.[127] The current practice employed in determining market concentration is through the Herfindahl-Hirschman Index (HHI).[128] The HHI is used to determine the changes in market concentration before and after the occurrence of a merger.[129] According to the DOJ/FTC Guidelines, the HHI is calculated by summing the squares of the individual firms' market shares.[130]

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124. *Id.*

125. U.S. Department of Justice & Federal Trade Commission, *supra* note 98, § 4.2.1.

126. *Id.*

127. *Id.* § 5.3.

128. FLYNN, ET AL., *supra* note 113, at 65.

129. U.S. 2010 Horizontal Merger Guidelines, *supra* note 98, § 5.3.

130. *Id.* Through the HHI, the current market classifications are as follows: "Unconcentrated Markets: HHI below 1500; Moderately Concentrated Markets: HHI between 1500 and 2500; Highly Concentrated Markets: HHI beyond 2500." *Id.*

In determining whether a merger is anti-competitive based on market concentration, the Guidelines provide for the following standards for relevant markets: (1) small change in concentration; (2) concentrated markets; (3) moderately concentrated markets; and (4) highly concentrated markets.[131] Of the four standards, the guidelines perceive mergers which create moderately concentrated markets and highly concentrated markets to be examined of the possibility of it being anti-competitive.[132]

3. Effects

It is likewise necessary to refer to the kinds of effects categorized in international practice, as the Regional Guidelines fail to categorize what kind of anti-competitive effects a merger can create within a relevant market. The DOJ/FTC Horizontal Guidelines categorizes these effects into either unilateral or coordinated effects.[133] Unilateral effects refer to the power of a merged firm to raise the price of a product and capture any loss from the increase of price given that buyers will "switch to another product that is now sold by the merged firm."[134] Coordinated effects, on the other hand, refer to the possibility for firms within a relevant market to collude and have prices beyond the competitive level.[135]

III. THE ASEAN COMPETITION FRAMEWORK

The regulation of anti-competitive mergers through competition laws in the ASEAN region was not a mere coincidence. It finds its roots in the creation of a single market and production base that is highly competitive in order to achieve regional economic integration. Thus, this Chapter of the Note shall discuss how the AEC was formed as well as the origins of the ASEAN and the AEC. Afterwards, it shall discuss the ASEAN Economic Blueprints and the Regional Guidelines. In discussing the Guidelines, this Chapter shall provide how the AMS defines prohibited mergers and their respective merger

131. *Id.*

132. *Id.*

133. *Id.* §§ 6-7.

134. FLYNN, ET AL., *supra* note 113, at 104.

135. *Id.* at 138.

notification systems. The Chapter shall conclude with discussing the future developments of competition law in the region.

A. History of the ASEAN

The ASEAN is a regional body which has undergone changes over the past few decades.[136] It was primarily a body organized to insulate its members from the effects of the Cold War by being a neutral party free from interference from both sides of the War.[137]

The earliest international document which established this region was the 1967 Bangkok Declaration.[138] While the Declaration did not create any binding obligations over its signatories, the document recognizes the values and principles which the AMS refers to in cooperating with each other.[139] This development progressed into formally granting the ASEAN legal personality as an intergovernmental organization under the 2007 ASEAN Charter[140] — formalizing the norms, values, goals, and purpose of the ASEAN as region.[141]

The Charter is the reflection of the AMS' goals of realizing three pillars: the ASEAN Economic Community, the ASEAN Security Community, and the ASEAN Socio-Cultural Community[142] — which in turn, reflect the

136. Marty Natalegawa, Foreign Minister of the Republic of Indonesia, *The Future of ASEAN*, Address at the ASEAN-Australia Special Summit, University of Sydney (Mar. 12, 2018).

137. Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, 43 N.Y.U. J. INT'L L. & POL. 159, 160 (2011).

138. *See* ASEAN Declaration (Bangkok Declaration), *signed* Aug. 8, 1967, 6 I.L.M. 1233 [hereinafter Bangkok Declaration].

139. Leviter, *supra* note 137, at 161 (citing Treaty of Amity and Cooperation in Southeast Asia art. 2, *signed* Feb. 24, 1976, 1025 U.N.T.S. 15063).

140. ASEAN Charter, *supra* note 9, art. 3.

141. *Id.* art. 2

142. Bali Concord II, *supra* note 68, ¶ 1.

guiding reasons for the original members of the ASEAN to enter into the Bangkok Declaration.[143]

B. ASEAN Economic Community

One of the purposes for the creation of the ASEAN, as mentioned in Article 1 of the Charter refers to the establishment of a single market and production base.[144] The Charter states this purpose in this manner —

> To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and [labor]; and freer flow of capital.[145]

The cited provision recognizes previous attempts of the ASEAN to become an economic region (i.e., the ASEAN Free Trade Agreement and the Bali Concord II).[146] Prior to the creation of the ASEAN Charter, the founding members of the ASEAN swore to create a single market to ensure the free flow of goods, services, capital, and investments.[147] It was believed that the first steps into creating market with free movement similar to the EU can be traced back to the formation of a PTA among the founding members of the ASEAN.[148] The creation of the PTA, however, did not achieve the dreams of the founding members.[149] Thus, the original six members of the ASEAN decided to create the AFTA in order to remove tariff barriers in the trade of goods between the AMS.[150] In addition to the AFTA, the AMS similarly created the AFAS to allow for the free flow of services through

143. *See generally* Bangkok Declaration, *supra* note 138.

144. ASEAN Charter, *supra* note 9, art. 1, ¶ 5.

145. *Id.*

146. Leviter, *supra* note 137, at 178.

147. SEVERINO, *supra* note 5, at 44.

148. *Id.*

149. *Id.*

150. *Id.* at 45.

mechanisms such as the mutual recognition agreements between the Member States.[151]

Despite removing tariff barriers to the free flow of goods, services, and investments, it has been argued that non-tariff barriers replaced tariffs as barriers to market access among the AMS.[152] Nevertheless, the provision looks outward into the future serving as a building block in the establishment of the AEC.

C. The ASEAN Economic Blueprints

The ASEAN Economic Blueprints were created to help the ASEAN fulfill its goal to become a *single market and production base*.[153] The first Blueprint was developed to achieve the goal of regional economic integration by the year 2020.[154] This goal was, however, accelerated to be achieved by the year 2015 when the leaders of the AMS came into an agreement to fast track the establishment of the AEC as a region with free movement of goods, services, investments and freer flow of capital.[155]

The first Blueprint established key characteristics which would govern the economic community. [156] The instrument explains that these key characteristics should not be taken in isolation and must be viewed as mutually reinforcing.[157]

Due to the goals of the first Blueprint being substantially achieved, the ASEAN Economic Ministers introduced the AEC Blueprint 2025 in 2015.[158]

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151. *Id.* at 47.

152. *Id.* at 48.

153. SEVERINO, *supra* note 5, at 58.

154. ASEAN, AEC BLUEPRINT 2015, *supra* note 13, ¶ 2.

155. *Id.* ¶ 4.

156. These characteristics include the establishment of a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy. *Id.* ¶ 8.

157. *Id.* ¶ 8.

158. ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ASEAN 2025: FORGING AHEAD TOGETHER 9 (2015) [hereinafter ASEAN, AEC BLUEPRINT 2025].

This decision to introduce a new Blueprint is in recognition of the fact that regional economic integration is dynamic — domestic economies and external factors are continuously developing and evolving[159] — but nonetheless, the goals and activities to be done in the first Blueprint have not been totally abandoned.[160]

Instead of the four key characteristics espoused by the first Blueprint, the second Blueprint now provides for five key principles.[161] Similar to the first Blueprint, the key characteristics of the second Blueprint must be read as mutually reinforcing and interrelated.[162]

D. Highly Competitive, Innovative, and Dynamic ASEAN

The two Blueprints provide for guidelines on competition policy in achieving the key characteristic of being a *competitive*, *innovative*, *and dynamic ASEAN* (or in the first Blueprint, a *Highly Competitive Economic Region*). The first Blueprint mentions that the goal of competition policy refers to fostering fair competition in the region.[163] It proposes four main actions in order to achieve this goal:

(1) [Endeavor] to introduce competition policy in all ASEAN Member Countries by 2015;

(2) Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;

159. *Id.* at ¶ 2.

160. The instrument is clear in stating that the overall vision of the first Blueprint still remains relevant in the creation of the AEC. *Id.* at ¶ 3.

161. *Id.*

162. *Id.*

163. These key principles are: (1) a highly integrated and cohesive economy; (2) a competitive, innovative, and dynamic ASEAN; (3) enhanced connectivity and sectoral cooperation; (4) a resilient, inclusive, people-oriented, and people-centered ASEAN; and (5) a global ASEAN. ASEAN, AEC BLUEPRINT 2015, *supra* note 67, ¶ 41.

(3) Encourage capacity building [programs]/activities for ASEAN Member Countries in developing national competition policy; and

(4) Develop a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition environment.[164]

The second Blueprint, on the other hand, defines the goal of competition policy as a means of providing a levelled playing field for all firms, regardless of their origin.[165] It relates this goal as an important element in fully realizing the facilitation of economic liberalization in trade and the creation of the single market and product base.[166] The second Blueprint, thus, proposes seven strategic measures in achieving this goal:

(1) Establish effective competition regimes by putting in place competition laws for all remaining ASEAN Member States that do not have them, and effectively implement national competition laws in all ASEAN Member States based on international best practices and agreed-upon ASEAN guidelines;

(2) Strengthen capacities of competition-related agencies in ASEAN Member States by establishing and implementing institutional mechanisms necessary for effective enforcement of national competition laws, including comprehensive technical assistance and capacity building;

(3) Foster a 'competition-aware' region that supports fair competition, by establishing platforms for regular exchange and engagement, encouraging competition compliance and enhanced access to information for businesses, reaching out to relevant stakeholders through an enhanced regional web portal for competition policy and law, outreach and advocacy to businesses and government bodies, and sector-studies on industry structures and practices that affect competition;

(4) Establish Regional Cooperation Arrangements on competition policy and law by establishing competition enforcement cooperation

164. ASEAN, AEC BLUEPRINT 2015, *supra* note 67, ¶ 41.

165. ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 26.

166. *Id.*

agreements to effectively deal with cross-border commercial transactions;

(5) Achieve greater [harmonization] of competition policy and law in ASEAN by developing a regional strategy on convergence;

(6) Ensure alignment of competition policy chapters that are negotiated by ASEAN under the various FTAs with Dialogue Partners and other trading nations with competition policy and law in ASEAN to maintain consistency on the approach to competition policy and law in the region; and

(7) Continue to enhance competition policy and law in ASEAN taking into consideration international best practices.[167]

1. ASEAN Competition Policy

Before the creation of the second Blueprint, the AEGC created the Guidelines to implement one of the action points in the first economic Blueprint.[168] The Guidelines define competition policy as regulatory measures which regulate the behavior of enterprises and the structure of industries and markets.[169] Thus, with the enactment of competition policy, the benefits of *economic efficiency*, *economic growth and development*, *and consumer welfare* can be achieved.[170]

The Guidelines further narrow down competition policy into two elements: (1) the setting up of policies to promote competition;[171] and (2) the promulgation of laws aimed at controlling or prohibiting anti-competitive activities.[172] Aside from defining competition policy, the Guidelines provide for the three common types of anti-competitive activities[173] — one of which

167. *Id.* ¶ 27.

168. ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶¶ 1.1.2–1.1.4.

169. *Id.* ¶ 2.1.2.

170. *Id.* ¶ 2.2.1.

171. *Id.* ¶ 2.1.1.1.

172. *Id.* ¶ 2.1.1.2.

173. *Id.* ¶¶ 3.2.1., 3.3.1, & 3.4.1

refers to prohibited mergers.[174] The Guidelines recommend following: (1) the prohibition of mergers which would lead to a substantial lessening of competition or acts which would significantly impede effective competition in a relevant market;[175] (2) the adoption of a regulatory framework in assessing whether a merger is indeed anti-competitive or not through mandatory or voluntary notification systems;[176] and (3) that each AMS may provide their own threshold based on different forms of criteria.[177]

Despite all the mentioned recommendatory guidelines, the AEGC, in the Guidelines, explicitly states that the instrument does not intend to create any binding obligation over the AMS.[178]

Currently, nine out of ten of the AMS have enacted their respective competition laws.[179] Cambodia, on the other hand, is still in the process of passing its own comprehensive competition law.[180] However, it is expected that its competition law will be passed soon.[181]

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174. ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶ 3.4.1.

175. *Id.* ¶ 3.4.1.

176. *Id.* ¶ 3.4.2.

177. *Id.* ¶ 3.4.3.

178. *Id.* ¶ 1.2.2.

179. *See generally* ASEAN, AEC BLUEPRINT 2015, *supra* note 13. The first members to promulgate comprehensive competition laws were Indonesia and Thailand, which legislated in 2000 and 1999, respectively. After the Bali Concord, Singapore (2004), Vietnam (2004) and Malaysia (2010) followed suit in the promulgation of their respective competition laws. The Philippines, Myanmar, Laos PDR, and Brunei all promulgated their comprehensive competition laws in 2015 just in time for the stated deadline in the first Blueprint. *See* ASEAN Expert Group on Competition, Inaugural Annual Report 2016 at 3 & 5, *available at* https://asean-competition.org/file/post_image/AEGC%202016%20Inaugural%20Annual%20Report%20-%20Final%20docx.pdf (last accessed Nov. 30, 2019).

180. *See generally* Draft Law on Competition of Cambodia (2018) (Cambodia).

181. ASEAN Expert Group on Competition, *supra* note 179, at 17.

E. Prohibited Mergers in the ASEAN Region

The following table shows the relevant competition laws that regulate mergers in each AMS, the scope of prohibition as regards mergers, and the corresponding substantive test to determine whether a merger is prohibited:

Country	Scope of Prohibition	Substantive Test in Prohibited Mergers
Brunei (Brunei Competition Order)	The law prohibits mergers which result or will result in the substantial lessening of competition within any market in Brunei, Darussalam.[182]	Mergers which have an effect of substantial lessening of competition[183]
Cambodia (Draft Competition Law of Cambodia)	The law prohibits business combinations which create an effect or will create an effect of substantially lessening, preventing, or distorting competition in a market.[184]	Mergers which have an effect of substantial lessening, preventing, or distorting of competition[185]
Indonesia (Law No. 5 of 1999 Concerning The Prohibition of Monopolistic Practices and	The law prohibits mergers that can create monopolistic practices or unfair business competition, [186] as well as acquisitions which contribute to the creation of	Mergers which create monopolistic practices or unfair business competition[188]

182. Brunei Competition Order, 2015, § 23.1.

183. *Id.*

184. Draft Law on Competition of Cambodia, art. 8. In this case, a market has been broadly defined in the act. Hence, the relevant market is not limited within the territory of Cambodia. *Id.*

185. *Id.*

186. Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, art. 28.

188. *Id.*

Country	Scope of Prohibition	Substantive Test in Prohibited Mergers
Unfair Business Competition)	monopolistic practices and/or unfair business.[187]	
Laos PDR (Law on Competition, No. 60/NA)	The law prohibits mergers which lead to control over a certain threshold of market share as determined by its competition authority, [189] as well as mergers which affect market access, limit technological advancements, and those which affect consumers, businesses, and the development of Laos PDR's economy.[190]	Mergers which lead to a control of a certain threshold of market shares in a limited market; limits technological advancements; and those which affect consumers, businesses; and the development of Laos PDR's economy[191]
Malaysia (Malaysian Aviation Commission Act)	The law prohibits mergers in the aviation service market which result or will result in the substantial lessening of the competition in the said market.[192] There is no express	Mergers which have an effect of substantial lessening of competition in the aviation market[194]

187. *Id.*

189. Law on Competition, No. 60/NA, art. 37.

190. *Id.*

191. *Id.*

192. Malaysian Aviation Commission Act, § 54. As previously discussed in the second chapter, the only law in Malaysia which prohibits anti-competitive mergers can be found in the Malaysian Aviation Commission Act.

194. Malaysian Aviation Commission Act (Laws of Malaysia Act 771), §54.

Country	Scope of Prohibition	Substantive Test in Prohibited Mergers
	prohibition in the general competition law.[193]	
Myanmar (The Pyidaungsu Hluttaw Law No. 9)	The law prohibits collaborations which intend to create dominance over a market over a certain period of time,[195] as well as prohibits collaborations which intend to decrease competition in a certain market through acquiring businesses in that market.[196]	Mergers which create a dominant position in the market[197]
Philippines (The Philippine Competition Act)	The law forbids the creation of merger or acquisition agreements which "substantially prevent, restrict or lessen competition" in a	Mergers which have an effect of substantially preventing,

193. Despite the exclusion of prohibited mergers in its general competition law, the Malaysian Competition Commission still regulates these activities through the other prohibited acts found in the law. Mergers may still be found violating the law if a merger creates a monopoly or would lead to the abuse of its power. Jeff Pak Lim Leong, Malaysia (An Article Published by The Merger Control Review, Sep. 2016), *available at* http://thelawreviews.co.uk/edition/the-merger-control-review-edition-7/1136349/malaysia (last accessed Nov. 30, 2019). *See also* Association of Southeast Asian Nations, Handbook on Competition Policy and Law in ASEAN for Business 2017 (A Handbook Published Online by the ASEAN Secretariat) at 28-29, *available at* https://www.asean-competition.org/file/post_image/Handbook%20on%20Competition%20Policy%20and%20Law%20in%20ASEAN%20for%20Business%202017.pdf (last accessed Nov. 30, 2019).

195. The Competition Law, § 31 (a) (Myan.).

196. *Id.* § 21 (b). Myanmar's competition law calls prohibited mergers as "collaboration among businesses." *Id.* § 30.

197. *Id.* § 31 (a).

Country	Scope of Prohibition	Substantive Test in Prohibited Mergers
	given relevant market as determined by the Philippine Competition Commission.[198]	lessening, or restrict competition[199]
Singapore (Competition Act)	The law prohibits mergers which have resulted, or will result in a substantial lessening of competition within any market in Singapore.[200]	Mergers which create an effect of substantial lessening of competition[201]
Thailand (Trade Competition Act)	The law forbids mergers which may result in a monopolization of a market or an unfair competition.[202]	Mergers which result in monopolization of a market or can cause unfair business competition[203]
Vietnam (Law on Competition)	The law prohibits economic concentrations [204] which create a combined market share of 50% of the relevant market.[205]	Mergers which result in a combined share of 50% in the market[206]

198. An Act Providing for A National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing The Philippine Competition Commission And Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667, § 20 (2014).

199. *Id.*

200. Competition Act (Chapter 50 B), § 54.

201. *Id.*

202. Competition Act B.E. 2542, § 26 (repealed 2017).

203. *Id.*

204. Vietnam's competition law categorizes mergers as economic concentrations. Law on Competition, No. 27-2004-QH11, art. 18 (Viet.).

205. *Id.*

206. *Id.*

Based from the table presented, each AMS has varied scopes of mergers to be reviewed — most, if not all, merger regimes follow a qualitative approach with the exception of Vietnam which directly prohibits mergers which create a combined market share of fifty percent of the relevant market. A similar observation can be deduced as to the variance regarding the tests used in determining whether a merger should be prohibited — most of the regimes apply the SLC test while the others apply the dominance test or the market threshold test.

F. Merger Notification Systems

In order to prevent the dissolution of mergers due to merger control, the Guidelines have also recommended the use of a notification system to determine whether a merger is deemed anti-competitive or not.[207] The Guidelines distinguish the systems of notifications as either mandatory or voluntary notification.[208] The mandatory notification system requires merging entities to notify the competition authorities before they may proceed with their transaction.[209] On the other hand, the voluntary notification system allows merging entities to assess their transaction by notifying the merger to a competition authority.[210]

To ensure that not all mergers are required to notify their transactions to the national competition authority, the Guidelines recommended the use of the following thresholds — national or global turnover of the merging parties, market shares of the parties, or the total amount of assets of the merged entity.[211]

The table below shows a summary of the merger notification system in each AMS and demonstrates the differences among these systems:

207. ASEAN, REGIONAL GUIDELINES, *supra* note 77, ¶ 3.4.2.

208. *Id.*

209. *Id.* ¶ 3.4.2.1.

210. *Id.* ¶ 3.4.2.2.

211. *Id.* ¶ 3.4.3.

Country	Pre-Merger Notification	Threshold Requirements	Post-Merger Notification	Threshold Requirements
Brunei	Mandatory[212]	No thresholds	Mandatory[213]	No thresholds
Cambodia	Mandatory[214]	No thresholds	Mandatory[215]	No thresholds
Indonesia	Voluntary[216]	Not applicable	Mandatory[217]	Asset Value of 2,500,000,000,000 Rupiah and/or sales turnover of 5,000,000,000,000 Rupiah[218]
Laos PDR	Voluntary[219]	Not applicable	Voluntary[220]	Not applicable
Malaysia	No Merger Control Regime	Not applicable	No Merger Control Regime	Not applicable
Myanmar	No merger notification system	Not applicable	No merger notification system	Not applicable

212. Brunei Competition Order, 2015, § 26.1.

213. *Id.* § 27.1.

214. Draft Law on Combination of Cambodia, art. 9.

215. *Id.*

216. Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, art. 28.

217. *Id.* art. 29.

218. *See* Komisi Pengawas Persaingan Usaha, Regulation 1/2009 (2009) (Indon.).

219. Law on Competition, No. 60/NA, art. 38.

220. *Id.*

Country	Pre-Merger Notification	Threshold Requirements	Post-Merger Notification	Threshold Requirements
Philippines	Mandatory[221]	₱1,000,000,000.00[222]	Voluntary	Not applicable
Singapore	Voluntary[223]	Not applicable	Voluntary[224]	Not applicable
Thailand	Mandatory[225]	No threshold	No requirement	Not applicable
Vietnam	Mandatory[226]	Combined market share in the relevant market of 30 to 50%[227]	No requirement	Not applicable

The merger notification systems in each AMS vary from having either a mandatory or a voluntary merger notification to their respective competition authority. The differences in the merger notifications can also be observed in the required thresholds (e.g., market shares, sales turnover, or asset combination) for merger notification.

Moreover, certain AMS have different modes of notification depending on whether the transaction has already been finalized or is yet to come into force. As regards the pre-merger notification requirement, five out of ten AMS use the mandatory notification procedure; three AMS use the voluntary notification scheme; and two AMS do not have a notification system at all. On the other hand, in post-merger notifications, three out of 10 AMS use the

221. Philippine Competition Act, § 17.

222. *Id.*

223. Competition Commission of Singapore, CCS Guidelines on Merger Procedure 2012, ¶ 3.2.

224. *Id.*

225. Competition Act B.E. 2542, § 35 (repealed 2017).

226. Law on Competition, No. 27-2004-QH11, art. 20 (1).

227. *Id.*

mandatory notification procedure; three use the voluntary notification procedure; and two do not have a post-merger notification requirement.

G. Future Developments in ASEAN Competition Policy

The development of regional competition law and policy in the ASEAN region is still in its early stages. The AEGC has released the *ASEAN Competition Action Plan* (2016-2025) as a means to identify different initiatives to achieve the goals in the ASEAN Economic Blueprint 2025.[228] To foster efforts in cross-border competition issues in the future, the AEGC recommended the identification of common elements and provisions for a regional cooperation agreement by 2020.[229]

To encourage and consolidate research on competition law and policy within the region, ASEAN officials have also begun taking steps to establish an ASEAN Research Center (ARCC) for Competition by 2020.[230]

More recently in October 2018, the AEGC established the ASEAN Competition Enforcers' Network (ACEN) to address the rise in cross-border issues in the region.[231] The ACEN's role is to facilitate cooperation on cross-border competition cases involving mergers and acquisitions.[232] The ACEN also aims to promote information sharing among the competition authorities

228. *See generally* ASEAN Expert Group on Competition, ASEAN Competition Action Plan (2016-2025), *available at* https://asean.org/storage/2012/05/ACAP-Website-23-December-2016.pdf (last accessed Nov. 30, 2019) [hereinafter ASEAN Competition Action Plan].

229. ASEAN Competition Action Plan, *supra* note 228, at 5.

230. ASEAN Expert Group on Competition, ASEAN works towards establishing an ASEAN Research Center for Competition, *available at* https://www.asean-competition.org/read-news-asean-works-towards-establishing-an-asean-research-center-for-competition (last accessed Nov. 30, 2019).

231. ASEAN Expert Group on Competition, ASEAN Establishes Competition Enforcers' Network, Regional Cooperation Framework, and Virtual Research Centre, *available at* https://www.asean-competition.org/read-news-asean-establishes-competition-enforcers-network-regional-cooperation-framework-and-virtual-research-centre (last accessed Nov. 30, 2019).

232. *Id.*

of AMS and enhance mutual understanding of their respective enforcement goals and objectives.[233]

In June 2019, ASEAN competition officials engaged in discourse to develop the ASEAN Peer Review Guidance Document for Competition Policy — an initiative geared towards assessing the effectiveness of the different competition regimes in the region.[234] During the same month, ASEAN and EU competition officials convened the 1st ASEAN-EU Competition Week, which marks the beginning of a five-year collaboration project between the two regions.[235] The event served as an avenue to exchange ideas and practices between the two regions and has allowed the ASEAN to learn from more experienced jurisdictions such as the EU.[236]

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233. *Id.*

234. ASEAN Expert Group on Competition, Brainstorming Meeting to Develop the ASEAN Peer Review Guidance Document for Competition Policy, *available at* https://www.asean-competition.org/read-news-brainstorming-meeting-to-develop-the-asean-peer-review-guidance-document-for-competition-policy (last accessed Nov. 30, 2019). The news report states that

> Outcome 1.2.3 of the ASEAN Competition Action Plan 2025 provides that at least five peer reviews are set to be conducted in ASEAN by 2025.
>
> ...
>
> The objective of the peer review exercise is to enable AMS to review the effectiveness of their national competition regimes, provide recommendations to enhance competition law enforcement including institutional design, and managing cooperation with other governmental bodies and foreign competition Authorities.

Id.

235. ASEAN Expert Group on Competition, The 1st ASEAN – EU Competition Week Convened, *available at* https://www.asean-competition.org/read-news-the-1st-asean-eu-competition-week-convened (last accessed Nov. 30, 2019).

236. *Id.*

IV. CROSS-BORDER MERGER ENFORCEMENT: EFFECTS AND CONFLICTS

Due to the emergence of globalization, mergers have become transnational in nature.[237] The nature of these transactions can indirectly affect States as merging firms frequently set up subsidiaries in different territories.[238]

As discussed in the previous Chapter, merger control has proliferated in different states not only to become responsive to a more globalized world,[239] but also to combat anti-competitive conduct done by firms, which may take form as unilateral or coordinated effects.[240] Correlated with the emergence of cross-border transactions and merger control regimes are the "long-arm" provisions in competition laws.[241] These provisions have been inserted to combat conduct arising outside a country's borders.[242] Their existence, however, poses a question relating to the regulation of extraterritorial effects existing in States who are members of regional economic communities which share the goal of economic and market integration.

A. Sovereignty

Sovereignty has been regarded as the primary source of international law governing the relations among a community of States.[243] It ensures that each member of the international community is regarded as a co-equal under international law.[244]

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237. Lawan Thanadsillapakul, *The Harmonization of ASEAN Competition Laws and Policy and Economic Integration*, 9 UNIF. L. REV. 479, 482 (2004).

238. *Id.*

239. RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 493 (2012).

240. *Id.*

241. *Id.* at 494.

242. *Id.*

243. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 447 (2008) (citing Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 177-78 (Apr. 11, 1949)).

244. *Id.*

Sovereignty has been defined as a "catch-all" of all the collective powers which a State may exercise under international law, [245] which can be categorized in terms of how it exercises its power.[246] It can be categorized as the State's entitlement to exercise control over its territory;[247] the right to represent its citizens under international law;[248] and even as the right to monopolize the exercise of power over its territory and citizens.[249]

Sovereignty, thus, presupposes the following consequences under international law: a State can exercise *prima facie* and exclusive jurisdiction over its territory and the people living within; [250] the responsibility of not interfering with the exclusive jurisdiction of other States;[251] and the necessity of consent in its obligation to adhere to treaties and customary law.[252]

B. The Concept and Principles of Jurisdiction

Jurisdiction, as an element of sovereignty,[253] has been defined as the State's capacity under international law of regulating the activities of both natural and juridical persons. [254] It thus creates the presumption that the exercise of jurisdiction should be limited to a forum State's territory.[255]

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245. *Id.* at 448.

246. *Id.*

247. *Id.*

248. *Id.*

249. JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 57 (2006).

250. CRAWFORD, *supra* note 243, at 447.

251. *Id.*

252. *Id.*

253. *Id.* at 470.

254. *Id.* at 457.

255. Ploykaew Porananond, A critical analysis of the prospects for the effective development of a regional approach to competition law in the ASEAN region, at 130 (Aug. 2016) (Ph.D. Thesis, University of Glasgow) (on file with University of Glasgow).

A State's exercise of jurisdiction can be divided into different categories based on how the State functions within its own territory — prescriptive and enforcement jurisdictions.[256] Prescriptive jurisdiction refers to the power of the State to enact and create laws and rules which normally refer to the regulation of "conduct, relations, status, or interests of a person" within the State.[257] Enforcement jurisdiction, on the other hand, refers to the power of the State to initiate executive or judicial action as a direct consequence of the laws and rules prescribed by the State.[258]

Traditionally, the exercise of jurisdiction has been categorized into two — the territorial and nationality principles.[259] These principles, however, have expanded and evolved into other principles which require a connection between the act and the State.[260] The exercise of jurisdiction now refers to five generally accepted principles.[261]

1. Territorial Principle

The territorial principle speaks of jurisdiction which covers acts done "wholly or substantially [ ] within the territory of the forum State."[262] It provides for a number of benefits such as convenience in the prosecution of acts as well as a presumption of State interest.[263]

The principle can be further differentiated into subjective territoriality and objective territoriality.[264] Subjective territoriality refers to the acquisition of

256. *Id.*

257. *Id. See also* BRUCE ZAGARIS, INTERNATIONAL WHITE COLLAR CRIME 220 (2010).

258. CRAWFORD, *supra* note 243, at 456.

259. *Id.* at 486.

260. *Id.* at 457.

261. *Id.* at 486.

262. DAVID MCCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS 164 (2007).

263. CRAWFORD, *supra* note 243, at 456.

264. *Id.* at 458.

jurisdiction when an act has been committed in the forum State despite being consummated abroad.[265] On the other hand, objective territoriality refers to when the forum State obtains jurisdiction over acts done outside its territory, provided that the act intends to have a substantial effect in the territory of the forum.[266] It may also refer to jurisdiction obtained where an essential element of a crime is consummated in the territory of the forum State.[267] The principle has been expounded further into the so-called "effects" doctrine developed by the US.[268]

2. Nationality Principle

The concept of nationality confers to a person rights and benefits derived from the State;[269] thus, creating a link between the person and the State.[270] As a consequence, the State may accordingly exercise and regulate the acts of its people accordingly, wherever they may be found.[271] By this consequence alone, the principle has been well-considered as an example of an exercise of extraterritorial jurisdiction. [272] It has been argued, however, that the application of the principle requires that the actor must be a national of the State during the commission of an act.[273]

3. Passive Personality Principle

The Passive Personality Principle refers to a State's exercise of its jurisdiction over acts committed outside its territory, where the act affects or will affect the State's nationals. [274] Having been considered as an offshoot of the

265. *Id.*

266. MCCLEAN, *supra* note 262, at 165.

267. CRAWFORD, *supra* note 243, at 456.

268. MALCOLM SHAW, INTERNATIONAL LAW 689 (2008).

269. *Id.* at 659.

270. CRAWFORD, *supra* note 243, at 459.

271. *Id.*

272. *Id.*

273. *Id.* at 460.

274. *Id.* at 464.

protective principle,[275] the principle has been widely criticized by legal scholars.[276] One argument suggests that the principle is dissonant with the domestic conceptualization of jurisdiction under international law.[277] Another argument suggests that the principle exposes persons from multiple jurisdictions.[278]

4. Protective Principle

The Protective Principle states that a State can obtain jurisdiction "over aliens for acts done outside its territory, which affect the internal or external security or other key interests of [the] state."[279] The principle has been applied not only to political acts but also to issues on immigration as well as economic offenses against the State.[280]

Compared to the application of the Passive Personality principle, it has been argued that the Protective principle is more acceptable because of focus on the collective interest of individuals who might be affected by the foreign act.[281] On the contrary, some argue that this principle can be the subject of

275. MCCLEAN, *supra* note 262, at 164.

276. CRAWFORD, *supra* note 243, at 461.

277. *Id.*

278. *Id.* at 461.

279. *Id.* at 462.

280. *Id.*

281. Danielle Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Under the Rule of Law?*, 13 MELB. J. INT'L L. 1, 16 (2012) (citing ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT 1 (2010)).

abuse by a State.[282] This abuse, however, can be mitigated by applying the principle only to "exceptional" cases as well as certain offenses.[283]

5. Universality Principle

The concept of universal jurisdiction is considered to be the most recent principle of jurisdiction.[284] Universal jurisdiction has been defined as the means where a State is able to assert its jurisdiction over offenders irrespective of where the offenders are as well as the other mentioned jurisdictional principles.[285]

In contrast to the previously discussed principles, this principle does not require a link between the forum State and the crime,[286] thereby allowing a State to prosecute crimes which are *jus cogens* in nature.[287] Thus, it enables a forum State to become an agent of the international community to prevent the conduct of *jus cogens* crimes.[288] Nevertheless, it has been ruled that the use of this principle must be qualified by a presence of a prohibiting norm under international law.[289]

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282. Ireland-Piper, *supra* note 281, at 17 (citing GILLIAN D TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 357 (2006) & Jennifer A Zerk, Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas (A Report for the Harvard Corporate Social Responsibility Initiative) at 13, *available at* https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf (last accessed Nov. 30, 2019).

283. *Id.*

284. *See generally* Center for Justice and Accountability, What is Universal Jurisdiction?, *available at* https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction (last accessed Nov. 30, 2019).

285. MCCLEAN, *supra* note 262, at 164-65.

286. CRAWFORD, *supra* note 243, at 463.

287. *Id.*

288. *Id.* at 290.

289. *Id.*

C. The Exercise of Extraterritorial Jurisdiction in Competition Law

Extraterritoriality has been defined as the "[exercise] of jurisdiction by a [State] over conduct occurring outside its borders."[290] Its application has become inevitable due to existence of globalization.[291] In particular, extraterritorial jurisdiction can also be exercised to regulate acts which are economic in character — including the application of extraterritorial jurisdiction in competition enforcement. This Section of the Note shall discuss prevailing jurisprudence with regard to the application of competition laws over acts done outside the regulating State's border. For the purposes of this Chapter, the Author shall discuss the developments of the exercise of extraterritorial jurisdiction in the US as well as in the EU.

1. Extraterritorial Jurisdiction of the US Antitrust Laws

The most prominent exercise of extraterritorial jurisdiction in the field of competition law can be found in the exercise of the US of its so-called "effects doctrine"— finding its roots in the case of *United States v. Sisal Sales Corporation*[292] and having found its way in *United States v. Aluminium Company of America*[293] (Alcoa) which enunciated the effects doctrine in an antitrust case for the first time.[294] The *Alcoa* court generally held that a State has the power to impose liability over an act done outside the borders of its territory, provided that such act causes effects "within the borders which the State reprehends."[295] Following this pronouncement, US courts would thus have

290. Ireland-Piper, *supra* note 281, at 6 (citing Deborah Senz and Hilary Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, 2 MELB. J. INT'L L. 69, 72 (2001)).

291. Ireland-Piper, *supra* note 281, at 6 (citing SPENCER ZIFCAK, GLOBALISATION AND THE RULE OF LAW 1 (2006)).

292. United States v. Sisal Sales Corporation, 274 U.S. 268 (1927).

293. United States v. Aluminum Company of America, 148 F.2d 416 (1945) (U.S.).

294. CRAWFORD, *supra* note 243, at 479. *See also* Porananond, *supra* note 255, at 132.

295. *Aluminum Company of America*, 148 F.2d at 444.

jurisdiction to apply the Sherman Act to foreign activity done outside its borders, provided there is an intention to affect US commerce.[296]

The application of the effects doctrine took a minor detour in the case of *Timberlane Lumber Co v. Bank of America*,[297] having introduced the "balancing test" which concerns the exercise of international comity and fairness.[298] In applying the "balancing test," the Court held that antitrust legislation will only apply to conduct outside its borders provided that the interests of the US is *sufficiently* compelling.[299] Despite initiating a means to create a framework in antitrust suits, the "balancing test" doctrine was highly criticized to be very unstructured as it did not provide for the proper process of evaluating State interests.[300]

The ruling of the Court in *Timberlane*, however, was short-lived. The effects doctrine was again recognized as the most prominent tool in antitrust enforcement in the case of *Hartford Fire Insurance Co. v. California* which abandoned the "balancing test."[301] The Court ruled that the US antitrust law will apply to foreign activities which intend and will have produced *substantial effect* in its territory.[302] It ruled that the only time the courts would defer from obtaining jurisdiction over the act would be limited to instances where foreign legislation would require an anti-competitive conduct to be committed.[303] The ruling meant that the US antitrust authorities and courts will only exercise

296. *Id.*

297. Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597 (1976) (U.S.).

298. Brendan J. Sweeney, *Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism*, 8 MELB. J. INT'L L. 35, *57 (2007). *See also Timberlane,* 549 F. 2d at 613.

299. *Timberlane*, 549 F. 2d at 614.

300. GERBER, *supra* note 29, at 70.

301. Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).

302. *Id.* at 796.

303. *Id.* at 798–99.

restraint in the exercise of jurisdiction when there exists a "true conflict" between the laws of the US and the law of a foreign state.[304]

The effects doctrine gets refined in the recent case of *F Hoffman-La Roche Ltd. v. Empagran SA*.[305] The *Empagran* Court ruled that, while the US may exercise extraterritorial jurisdiction over anti-competitive foreign conduct, the application of its laws is only limited to domestic injury incurred in its territory.[306] It further clarified that US courts may not obtain jurisdiction over foreign conduct when the injury incurred outside its borders is different from the harm it suffers.[307] The *Empagran* ruling, however, did not remain unscathed. Numerous amicus briefs from different States protested that the exercise of extraterritorial jurisdiction based on the *Empagran* ruling as a clear violation of international law.[308] They exclaimed that such exercise may result in US dominance in the field of antitrust regulation to the extent that it could be referred as the *de facto* world antitrust court.[309]

It is impossible to imagine that the application of the effects doctrine does not attract any consequences.[310] The US has suffered retaliatory measures from its trading partners due to the differences in their economic policies and regulation.[311] *In re Uranium Antitrust Litigation*[312] (Uranium) illustrates this negative consequence for applying antitrust rules on states which encourage

304. *Id.* at 797.

305. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

306. *Id.* at 165.

307. *Id.* at 164.

308. GERBER, *supra* note 29, at 74.

309. *Id.*

310. Sweeney, *supra* note 298, at *56.

311. *Id.*

312. In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (U.S.).

cartel activity.[313] As a reaction to the *Uranium* ruling, US trading partners enacted blocking statutes and claw back legislations.[314]

2. Exercise of Extraterritorial Jurisdiction in the EU

Compared to the exercise of extraterritorial jurisdiction in the US, the EU's exercise of extraterritorial jurisdiction did not originate from legal statute.[315] Instead, it was case law, in *Imperial Chemical Industrial Ltd. v. Commission of the European Communities* (Dyestuffs), which resolved the issue of extraterritoriality in discussing the jurisdictional limitations of EU Competition Law.[316] The European Court of Justice (ECJ) applied EU Competition Law over parent companies operating outside the Common Market through the introduction of the Single Economic Entity doctrine.[317] In applying the doctrine, it ruled that the ECJ may obtain jurisdiction over anti-competitive behavior of an entity operating outside its jurisdiction through its subsidiaries.[318]

Aside from the Single Economic Entity doctrine, the EC has also used different doctrines in exercising jurisdiction over acts done outside the EU's borders. The *Re Woodpulp Carter: A Ahlström Oy v. Commission of the European Communities*[319] (Woodpulp) decision is currently known for the application of

313. Sweeney, *supra* note 298, at *56.

314. *Id.* Claw back statutes allow for an enterprise apprised of anti-competitive conduct to be free from the enforcement of U.S. judgments awarding treble damages. WHISH & BAILEY, *supra* note 239, at 506. On the other hand, blocking statutes refer to laws which prevent the exercise of extraterritorial jurisdiction of antitrust laws within the enacting state. *Id.* at 488.

315. Porananond, *supra* note 255, at 134.

316. Imperial Chemical Industrial Ltd. v. Commission of the European Communities, Case C-48/69, 1972 ECR I-619.

317. *Id.* ¶¶ 132-37.

318. *Id.* ¶¶ 140-44.

319. A. Ahlström Osakeyhtiö v. Commission of the European Communities, Case C-89/85, 1988 ECR I-5193.

the "implementation test" in antitrust cases.[320] There, the ECJ held that the EC may obtain jurisdiction provided that the anti-competitive conduct has been implemented in the Common Market;[321] it deemed irrelevant the place where the agreement was perfected.[322]

The *Grosfillex – Fillistorf*[323] case was the first real instance where the EC fully exercised the effects doctrine. The EC ruled that the only criterion for the application of EU Competition Law is "whether [anti-competitive] conduct affects competition within the Common Market or is designed to have this effect," regardless of where an entity is located and where the anti-competitive conduct has been perfected or implemented.[324] The *Grosfillex* ruling became crystallized in EU Competition Law through Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU) by prohibiting conduct "[affecting] trade between Member States and which have as their object or effect the prevention, restriction[,] or distortion of competition within the internal market."[325]

While *Grosfillex* emphasizes the applicability of the TFEU provisions with regard to conduct done outside its border, the ECJ in *Gencor Ltd. v. Commission of the European Communities*[326] provided an explanation with regard to exercise of extraterritorial jurisdiction over merger activities outside the EU.[327] The case involved a merger which was perfected and approved by the

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320. Sweeney, *supra* note 298, at ★61.

321. *Ahlström*, 1988 ECR I-5193, ¶¶ 14-15.

322. *Id.*

323. Commission Decision 64/344/EEC of 1 June 1964 concerning a request for negative clearance pursuant to Article 2 of Regulation 17 (Grosfillex – Fillistorf case), 1964 J.O. (58) 915.

324. *Id.*

325. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, ¶ 1, 2012 O.J. (C 326) 47 [hereinafter TFEU].

326. Gencor Ltd. v. Commission of the European Communities, Case T-102/96, 1999 ECR II-753.

327. *See Gencor Ltd.*, 1999 ECR II-753, ¶ 73-74.

competition authorities in South Africa.[328] The parties to the merger claimed that the exercise of jurisdiction by the EC was contrary to the principles of public international law.[329] The ECJ disagreed with the parties and held that the exercise of jurisdiction was indeed consistent with public international law.[330] It held that application of EU regulation is justified under public international law as the merger creates an immediate and foreseeable effect in the EU.[331]

To further elaborate on the exercise of extraterritorial jurisdiction of the EC, the ECJ also determined whether the exercise of objective territoriality is inconsistent with the principle of non-interference under international law.[332] It has been argued by the merging parties that the EC may not exercise jurisdiction in prohibiting the merger as doing so would create a conflict of jurisdiction.[333] The ECJ immediately rejected such argument on the basis that such issue of conflicts of jurisdiction does not exist under the principles of international law.[334] Moreover, it ruled that South African authorities' approval of the merger does not create a competition issue.[335] Whish argues that the ECJ, in discussing the principle of non-intervention and proportionality, acknowledged the use of comity analysis with regard to the exercise of extraterritorial jurisdiction.[336]

D. Extraterritoriality in the ASEAN Region

The application of the principle of extraterritoriality is not limited to mature competition regulatory regimes.[337] As previously discussed in Chapter 1 of this

328. *Gencor Ltd.*, 1999 ECR II-753, ¶ 8.

329. *See Gencor Ltd.*, 1999 ECR II-753, ¶ 48.

330. *Id.* ¶ 50.

331. *Id.* ¶¶ 90-97.

332. *See Gencor Ltd.*, 1999 ECR II-753, ¶¶ 102-108.

333. *Id.* ¶ 103.

334. *Id.* ¶¶ 103-108.

335. *Id.*

336. WHISH & BAILEY, *supra* note 239, at 500.

337. Porananond, *supra* note 255, at 139.

Note, the AMS are all close to full compliance of enacting competition laws within their respective jurisdictions. In a review of the AMS competition legislations, six out of ten of the AMS have expressly legislated to include foreign conduct affecting their domestic economy within the scope of their respective competition laws.[338] Despite being in the process of finalizing its competition law, it should be noted that Cambodia also prohibits foreign conduct which affects its domestic economy.[339]

1. Scope of the Competition Laws

In understanding the exercise of extraterritorial jurisdiction by competition authorities in the ASEAN, it is equally important to consider the scope of the application of the respective competitions laws by the AMS. This Section of the Note shall first discuss whether an AMS law covers both conduct done within and without the territory of the AMS. Following the discussion of the scope of the competition law of each respective AMS, it is essential to determine how each AMS enforces their respective competition law extraterritorially. As discussed, the extraterritorial application of competition law may refer to the following doctrines: effects doctrine, implementation doctrine, and the single economic unit doctrine.

a. Brunei

Brunei's competition law covers acts done both inside and outside Brunei.[340] The reach of the law over anti-competitive mergers includes those where

338. *See* Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, art. 16 (1999) (Indon.); Law on Competition, No. 60/NA, art. 6 (Laos); Philippine Competition Act, § 3, para. 1; Competition Act (Chapter 50B), § 33 (1) (Sing.) & Competition Order, 2015 § 10 (1) (2015) (Brunei), The Competition Law, § 3 (a)-(b) (Myan.).

339. *See* Draft Law on Competition of Cambodia, art. 3, *available at* https://asean-competition.org/file/pdf_file/Draft%20Law%20on%20Competition%202018.pdf (last accessed Nov. 30, 2019).

340. Competition Order, 2015, § 10 (1).

parties of a merger are outside of Brunei and anticipated mergers implemented outside Brunei.[341]

Brunei's competition legislation also acknowledges the application of the effects doctrine. The law explicitly states that mergers taking place outside Brunei or any anticipated merger outside Brunei is covered by the law,[342] provided the merger results or will result to the substantial lessening of competition within any market in Brunei.[343] Conversely, the law is silent with regard to its adoption of the single economic unit and implementation doctrine in its law.

b. Cambodia

While Cambodia's competition law is still in the process of being legislated, the draft Competition Law can guide the readers in assessing the scope of the law's application. The draft law provides that it shall apply regardless of where the source took place, provided that the conduct shall cause competitive harm on Cambodia's economy.[344]

It can be inferred that Cambodia's draft competition law adopts both the implementation and effects doctrine. The implementation doctrine is inferred from the law's scope of application as it refers to harm which source is outside its territory.[345] On the other hand, the effects doctrine can be inferred from the prohibition of mergers which have the effect of significantly preventing, restricting, or distorting competition in a market.[346]

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341. *Id.*

342. *Id.*

343. *Id.* § 23.

344. *See* Draft Law on Competition of Cambodia, *supra* note 339, art. 3.

345. *Id.* art. 3.

346. *Id.* art. 8. The law does not distinguish where the effect originates from. *See* Draft Law on Competition of Cambodia, *supra* note 339, art. 8.

c. Indonesia

The scope of Indonesia's competition law covers the conduct of entrepreneurs.[347] The law seems to adopt only the implementation doctrine of extraterritoriality as it only covers conduct done within the legal territory of Indonesia.[348] The Single Economic Unit doctrine, on the other hand, is seen to be applied only through jurisprudence.

Indonesia has a fair share of applying its Business Competition Law extraterritorially over foreign conduct as seen in the case of *VLCC*.[349] In *VLCC*, the Supreme Court of Indonesia applied the single economic unit doctrine in adjudicating against an entity which did not have any business presence in Indonesia.[350] The Court penalized the foreign entities concerned for conducting bid-rigging cartel behavior.[351]

The application of extraterritoriality in Indonesian Competition jurisprudence takes a very peculiar turn in the *KPPU v. Temasek Holding, et al.* (*Temasek Group)* case.[352] The Commission held Temasek Holdings, a Singaporean firm, liable for anti-competitive conduct under the Business

347. Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, art. 2. An entrepreneur, as defined, must either be established and domiciled or is engaged in business activities within the legal territory of Indonesia. *Id.* art. 1 (5).

348. *Id.* art. 1 (5).

349. Kurnia Toha, *Extraterritorial Applicability of Indonesia Business Competition Law as an Efforts Dealing ASEAN Single Market*, 15 JURNAL DINAMIKA HUKUM 19, 21 (2015). *See also* KPPU v. PT Pertamina (Persero), et al., Putusan Mahkamah Agung Nomor, Case No. 04K/KPPU/2005 (2005) (Indon.).

350. *Id.*

351. Rikrik Rizkiyana, Seeking More Power and Order, *available at* https://v1.lawgazette.com.sg/2014-01/940.htm (last accessed Nov. 30, 2019).

352. KPPU v. Temasek Holding et al., ICC Case No. 07/KPPU-L/2007, Nov. 19, 2007, ¶¶ 6.1.1-6.1.3, *available at* http://www.kppu.go.id/docs/Putusan/putusan_temasek_eng.pdf (last accessed Nov. 30, 2019) (Indon.). *See also* Rikrik Rizkiyana, et al., *Indonesia*, *in* MERGER CONTROL: JURISDICTIONAL COMPARISONS 339 (Jean-François Bellis, et al. eds., 2011).

Competition Law.[353] The Commission reasoned that the entity engaged in monopolistic behavior through its subsidiaries located in Indonesia.[354] Similar to the *VLCC* case, however, is the Court's application of the single economic unit doctrine in acquiring jurisdiction over the Singaporean parent company.[355]

The *Temasek Group* case presents an interesting application of ASEAN Competition Policy. While having been decided prior to Guidelines, it illustrates how an AMS may apply its domestic competition law over acts committed by a foreign parent corporation located in the ASEAN region. The case, however, only touches on a small problem to be addressed in this Note. The problem yet to be answered is the scenario where the AMS would have conflicting jurisdictions over the extraterritorial application of their competition laws.

From the discussion, it seems that Indonesia's competition law still adheres to the territorial application of its competition laws. Thus, Indonesia's competition law does not completely adhere to a real extraterritorial application of its laws through the effects doctrine.

d. Laos PDR

The Decree on Trade Competition does not make any distinction whether the conduct is done within or without the Laos territory, which can be inferred from the language of business persons in the decree.[356]

e. Malaysia

The Competition Act 2010 covers commercial activities done within and outside Malaysia.[357] For conduct done outside Malaysia to be covered, the

353. *Id.*

354. *Id.*

355. *Id.*

356. *See* Decree on Trade Competition, No. 15/PMO, art. 2 (2004) (Laos). A business person is defined as "a person who sells goods, buy goods for further processing, and [sells] or buys goods for resale[,] or is a service provider." *Id.*

357. Laws of Malaysia, Act 712 [Competition Act 2010], § 3 (1) (2010) (Malay.).

commercial activity must have an effect on the competition in any market within Malaysia.[358]

From the wording of the law, Malaysia seems to adopt both the implementation doctrine and the effects doctrine in the extraterritorial application of its competition law.[359] On the other hand, it can also be observed that the law also adheres to the single economic unit doctrine through the law's definition of an enterprise. It states that a parent and its subsidiaries shall be regarded as one single economic unit if the subsidiaries do not enjoy autonomy in their actions, despite their separate legal personality.[360]

f. Myanmar

The Competition Law is silent regarding the scope of activities which the law covers. It could be implied from the crafting of the provisions that outside activities are covered by the law. The Competition Law refers to businesses that either import or export goods or services to Myanmar.[361]

Myanmar's competition legislation does not seem to embrace the extraterritoriality principle. Despite the silence of the law, it prohibits acts done which reduce or hinder competition in the market.[362] However, it can be assumed that the effects and implementation doctrine both apply from the use of the term "exports".[363]

g. Philippines

The Philippine Competition Act (PCA) covers acts done by "any person or entity in any trade, industry and commerce" in the Philippines.[364] The law also applies to "international trade having direct, substantial, and reasonably

358. *Id.* § 3 (2).

359. *Id.* § 3.

360. *Id.* § 2.

361. The Competition Law, § 2 (i).

362. *Id.* § 2 (g).

363. *Id.* § 2 (i).

364. Philippine Competition Act, § 3.

foreseeable effects in the trade, industry, or commerce" in the Philippines;[365] international trade, likewise, covers acts done outside the Philippines.[366]

The law is clear with regard to the application of its provisions over conduct done outside the Philippine territory. It does not make any distinction on whether the undertaking is done by a domestic or foreign entity. It can, thus, be inferred that the law follows the implementation doctrine.

The law similarly adheres to the effects doctrine in terms of enforcement and application. The law is clear in stating that it covers conduct having "direct, substantial, and reasonably foreseeable effects" in the Philippines.[367]

The application of the single economic unit doctrine seems to be absent in the law. However, the law seems to recognize the doctrine in understanding how control is understood through its implementing rules.[368]

h. Singapore

The Competition Act of Singapore covers any kind of undertaking.[369] It covers both natural and legal persons who are capable of engaging in an economic activity.[370] The Guidelines on Major Provisions further elaborate the scope of the application of the law under Section 33 (1) to cover acts done outside Singapore whether the act will be implemented in Singapore which includes mergers done outside Singapore.[371]

Singapore follows the effects, implementation, and single economic unit doctrines.[372] As regards the application of such doctrines in jurisprudence, the

365. *Id.*

366. *Id.*

367. *Id.*

368. Implementing Rules and Regulations, Philippine Competition Act, § 6.

369. Competition and Consumer Commission of Singapore, CCS Guidelines on the Major Competition Provisions 2016, § 1.1 (Dec. 1, 2016).

370. *Id.*

371. Competition Act (Chapter 50B), § 33 (1).

372. *Id.*

Competition Commission of Singapore has applied the Single Economic Unit doctrine in its rulings.

In the *Ball Bearings* case, the Competition Commission of Singapore penalized Japanese parent companies and their Singaporean subsidiaries for infringing the Singapore Competition Act, specifically the provision prohibiting anti-competitive agreements.[373] In holding the Japanese parent companies liable, the Commission adopted the single economic unit test of the ECJ.[374] It explained that the single economic unit similarly refers to a single undertaking committed by a number of actors.[375] The principle was applied in the case by stating that the subsidiaries of the parent companies did not have any economic independence making them only a part of one unit.[376]

Within the same year, the Competition Commission of Singapore again used the single economic unit test in penalizing a price-fixing arrangement. Similar to the *Ball Bearings* case, the Commission also penalized foreign parent companies and its Singaporean subsidiaries violating Section 34 of the Singapore Competition Act. [377] The Commission, however, further developed the application of Section 34 over foreign entities by recognizing

373. Infringement of the Section 34 Prohibition in relation to the supply of ball and roller bearings, Case No. CCS 700/002/11, May 27, 2014, ¶¶ 470, 479, 495, 520, & 529 *available at* https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/ccs-imposes-penalties-on-ball-bearings-manufacture/ball-bearings-id.pdf?la=en&hash=2F4563D2C00BAC345AE3F3B7E9C2593D55303715 (last accessed Nov. 30, 2019).

374. *Id.* ¶ 85.

375. *Id.*

376. *Id.* ¶¶ 89 & 369.

377. Infringement of the section 34 prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore, Case No. CCS 700/003/11, Dec. 11, 2014, ¶¶ 66, 711, 722, 735, 747, 778, 789, 803, 813, 825, 835, & 845, *available at* https://www.cccs.gov.sg/-/...freight.../air-freight-forwarding--infringement-decision-nonconfidentialpublic-register.pdf (last accessed Nov. 30, 2019) (Sing.).

the extraterritorial application of provisions.[378] It held that the prohibition against anti-competitive agreements apply "notwithstanding that an agreement has been entered into outside Singapore or that any party to such agreement is outside Singapore."[379]

i. Thailand

From the reading of the law, it seems that the Thailand Competition Act covers only enterprises within Thailand's territorial jurisdiction.[380] Thus, the only instance where Thailand can exercise jurisdiction "extraterritorially" is when an anti-competitive conduct is implemented within its jurisdiction.[381] This observation shows that Thailand's competition law can only be enforced within its territorial jurisdiction, following the implementation and single economic unit doctrines.[382]

j. Vietnam

Vietnam's Law on Competition only applies to anti-competitive conduct in Vietnam.[383] The law is clear in covering only enterprises which operate in Vietnam, regardless of being domestic or foreign entities.[384]

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378. *Id.* ¶ 67 (citing Competition Act (Chapter 50B), § 33 (1)).

379. *Id.*

380. Competition Act B.E. 2542, § 4 (repealed 2017).

381. *Id.*

382. It must be noted that the Thailand Competition Act has been repealed by the Trade Competition Act on 5 October 2017, which now includes cross-border transactions. Section 58 the Trade Competition Act imposes administrative fines on those who engage in unreasonable agreements with foreign firms. This covers "any juristic act or contract which results in monopoly or unfair restriction of trade without justifiable reason, and has a severe impact on the economy and the consumers' interest." Rajah & Tann Asia, Thailand's New Trade Competition Act, *available at* https://th.rajahtannasia.com/media/2894/2017-08-new-thai-trade-competition-law.pdf (last accessed Nov. 30, 2019) (citing Trade Competition Act, B.E. 2560, § 58 (2017) (Thai.)).

383. Law on Competition, No. 27-2004-QH11, art. 2.

384. *Id.*

Despite the wording of the law, the Vietnam Competition Authority has previously applied the Competition Law of Vietnam to foreign conduct.[385] This action has been evinced in the assumption of jurisdiction by the Vietnam Competition Authority over an offshore merger and acquisition and a joint venture through a voluntary notification.[386] In the case of the joint venture, it was notified on the assumption that it would affect the Vietnamese shipping market.[387]

Based on the examples discussed, the application of the extraterritorial reach of the Competition Law of Vietnam is limited only to voluntary acts done by different economic undertakings.[388] Absent actual enforcement by the Vietnam Competition Authority on its own, the application of extraterritorial jurisdiction is limited only to voluntary notification as the activities were done outside Vietnam.

k. Summary of the Extraterritorial Application of Competition Laws in the ASEAN

Country	Extraterritoriality	Implementation	Single Economic Unit	"Effects" Doctrine
Brunei	Express	Silent	Silent	Express
Cambodia	Express	Express	Silent	Express
Indonesia	Implied	Express	Express	Silent
Lao PDR	Implied	Implied	Implied	Implied
Malaysia	Express	Express	Implied	Express
Myanmar	Silent	Implied	Silent	Implied
Philippines	Express	Express	Express	Express
Singapore	Express	Express	Express	Express

385. Thanh Phan, *The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach*, 77 LA. L. REV. 425, 473 (2016).

386. *Id.* at 473-74.

387. *Id.*

388. *Id.*

Country	Extraterritoriality	Implementation	Single Economic Unit	"Effects" Doctrine
Thailand	Express	Implied	Implied	No application[389]
Vietnam	Silent	No application	No application	No application

E. Conflicts of Jurisdiction in Cross-border Competition Cases

As discussed in this Chapter, the grant of the exercise of extraterritorial jurisdiction in competition laws empowers a competition authority to regulate anti-competitive behavior done outside its borders conditioned on a transaction creating an effect in the market of the regulating State. While this set-up looks beneficial for the economic interest of the regulating State, cases such as the *Boeing/McDonnell Douglas, GE/Honeywell*, and *Gencor/Lonrho* exhibit the possibility of conflicts of jurisdiction between competition authorities. The Author shall present the current practices of conflicts of jurisdiction in competition cases using US and EU jurisprudence.

Conflicts regarding the exercise of jurisdiction due to the long arm reach of competition laws have been part of the discussion ever since the incident between the US and the EU in the *Boeing/McDonnel Douglas* and *GE/Honeywell* cases. Jurisdictional conflicts, however, have already been resolved by the US and EU courts in the past.

Under US jurisprudence, conflicts of jurisdiction with regard to competition cases have been resolved in the case of *Hartford*. There, the Court ultimately rejected the balancing of interest test enunciated in *Timberlane*; it stated that US antitrust regulation is applicable for as long as an undertaking produces a substantial effect in its territory.[390] The Court's ruling in *Hartford* was subject to the dissent of Justice Antonin Scalia.[391] In his dissent, Justice Scalia argued that a balancing analysis should be used in determining proper

389. It is important to note that that the Thailand Competition Act has been repealed to include cross-border transactions.

390. *Hartford*, 509 U.S. at 796.

391. *Id.* at 817 (J. Scalia, dissenting opinion).

jurisdiction in cases of concurrence between two authorities.[392] He argued that the principle of comity has been accepted as a principle of international law as evidenced by the Third Restatement.[393]

On the other hand, EU jurisprudence regarding the issue of conflicts of jurisdiction has been discussed in the *Gencor* case. There, the ECJ ruled that rules on conflicts of jurisdiction are not applicable in cases where there is no "true conflict" — where an act is encouraged by the State where the transaction happened.[394] The ECJ's finding is similar to that of the *Hartford* case as there is a disregard on the application of rules of conflicts of jurisdiction. This shows that conflicts of jurisdiction would only arise when a sovereign State finds such act legal in its legislation.

The rulings in *Hartford* and *Gencor* show how the application of the rules on conflicts of jurisdiction are insufficient in cases of transactions that have cross-border effects. The lack of rules on conflicts (or concurrences) of jurisdiction would become more relevant when these transactions occur in a single market. The Author's analysis shall focus on this problem.

V. LEGAL ANALYSIS

> *[W]hile uncertainties and weaknesses in the global economy remain a cause for concern, ASEAN is committed and determined to keep pursuing regional integration efforts, to ensure a region that is stable and open for business, and that the benefits and opportunities will be enjoyed by all ASEAN peoples.*
>
> — H.E. Le Luong Minh, Secretary-General of ASEAN, ASEAN Business Forum 2014, Bangkok[395]

The previous Chapters illustrate that anti-competitive effects of cross-border mergers can reach beyond a host State's borders. As a way to prevent or

392. *Id.* at 815.

393. *Id.* at 817.

394. *See Gencor Ltd.*, 1999 ECR II-753, ¶¶ 103-04.

395. H.E. Le Luong Minh, Secretary-General of the ASEAN, Address at the ASEAN Business Forum 2014 at Bangkok, Thailand (Nov. 14, 2014) (transcript *available at* http://www.asean.org/wp-content/uploads/images/pdf/2014_upload/14%20November%202014_Message_ASEAN%20Business%20Forum.pdf (last accessed Nov. 30, 2019)).

regulate these mergers, competition laws have begun to extend their reach beyond an enforcing State's borders. These "long-arm statutes" are created to protect the domestic economic interest of an enforcing State. The previous Chapters further illustrated the possible conflicts which the use of long-arm statutes can cause based on the economic tests deployed by a State. Lastly, they showed how these conflicts cannot be addressed through the rules of conflicts of jurisdiction or comity.

In light of the discussion found in the previous Chapters, this part of the Note shall discuss how cross-border mergers with regional or global effects are regulated in a single market framework. The analysis shall begin with a discussion of how the EU, a successful single market, has regulated cross-border mergers with regional or global effects. In this part of the Chapter, focus shall also be given to the importance of a competition framework in a single market. This Note shall discuss relevant EU regulations, principles, and case law in developing the cross-border merger control framework in a single market.

After understanding the cross-border merger control framework of the EU single market, this Chapter shall discuss whether mergers with regional or global effects are more effectively addressed at a regional perspective. In answering the former question, it shall also determine whether the current cross-border merger control framework of the EU single market may be adopted by the ASEAN and its Member States in regulating mergers with regional or global effects.

If the questions are answered affirmatively, this Chapter shall then evaluate the current ASEAN legal framework over mergers which have regional or global effects. This part of the Note shall focus on whether jurisdictional conflicts due to extraterritorial exercise of jurisdiction is incompatible with the principle of free flow of goods and is thus inconsistent with the single market principle.

A. Understanding Cross-Border Mergers Under the Single Market Framework

1. The EU Approach with Regard to Competition and the Single Market

The principle of free movement has been the primordial reason for the market integration in the EU.[396] This fact can be observed in the Treaty on the

396. GIOGIO MONTI, EC COMPETITION LAW (LAW IN CONTEXT) 39 (2007).

Functioning of the EU where it defines the internal market as an area where there is free movement of goods, services, workers, and capital.[397] Despite the importance of the principle of free movement, it should not be taken in isolation for the functioning of the internal market. Thus, competition rules were created to preserve this fundamental principle of the common market.[398]

Competition law has always been one of the cornerstones of the EU Common Market.[399] In the Treaty of Rome, the main instrument creating the European Economic Community, the EU Member States created a common market where trade barriers are eliminated amongst themselves.[400] There, they have similarly included rules on competition to ensure that the private conduct distorting competition in the Common Market would be deterred.[401]

Thus, in ensuring the absence of distortion of competition, rules on competition were used to enable and assist in the formation of the single market.[402] The Treaty of Rome, in its preamble, placed emphasis in preserving competition by stating that a system was needed to be created to prevent distortion in the internal market.[403] The importance of competition in the internal market continues to be present in the Lisbon Treaty. In its preamble, the Lisbon Treaty gave the EU exclusive competence to establish competition rules necessary to the functioning of the internal market.[404]

The complementing relationship between competition and the principle of free movement has been laid down by the ECJ in a number of cases. The

397. TFEU, *supra* note 325, art. 26 (2).

398. JULIO B. CRUZ, BETWEEN COMPETITION AND FREE MOVEMENT: THE ECONOMIC CONSTITUTIONAL LAW OF THE EUROPEAN COMMUNITY 87 (2002).

399. GERBER, *supra* note 29, at 182.

400. *Id.*

401. *Id.*

402. *Id.* at 183.

403. WOLF SAUTER, COHERENCE IN EU COMPETITION LAW 30 (2016).

404. TFEU, *supra* note 325, art. 3.

most prominent of these cases is *Grundig*[405] which relates to vertical agreements.[406]

In this case, Grundig appointed Consten as the exclusive distributor of its products in France through an exclusive distributorship agreement.[407] In nullifying the agreement, the ECJ tried to answer the issue of whether an agreement would create a threat to the freedom of trade between the Member States, which in turn would harm the objective of creating a single market.[408] In ruling in the affirmative, it held that the import restriction created by the parties were indeed limitations on the freedom to trade.[409] It postulated that the agreement would restore national divisions of trade between States which would frustrate the fundamental objective of market integration.[410] Further, the Court emphasized the intent of the Treaty of Rome of abolishing barriers between States, and it thus cannot allow establishments to recreate those barriers.[411]

In relation to creating limitations on the freedom to trade, the Court also emphasized that the principle of freedom of competition aims to preserve effective competition by ensuring that the private actors are not allowed to distort competition in the common market through the isolation of national markets.[412]

The *Grundig* case examined and laid down the relationship between competition and the single market in instances of agreements which are under the scope of Articles 81 and 82 of the Treaty of Rome (now Articles 101 and

405. Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v. Commission of the European Economic Community, Joined Cases C-56 & 58/64, 1966 ECR I-299.

406. *See Grundig*, 1966 ECR I-299, 307-08.

407. *Grundig*, 1966 ECR I-299, 343.

408. *Id.* at 341.

409. *Id.*

410. *Id.* at 340.

411. *Id.*

412. *Id.* at 343.

102 of the Lisbon Treaty). In relation to anti-competitive mergers, the case of *Continental Can*[413] showed the relationship between competition and the single market prior to the enactment of the European Community Merger Regulation (ECMR).

In this case, the EC prohibited Continental Can's acquisition of a competitor through its subsidiary.[414] The ECJ, in affirming the decision of the EC, relied on the provisions of Articles 81 and 82 of the Treaty of Rome. The Court ruled the acquisition can result into a possible abuse of dominance by *Continental Can*.[415] It then reasoned out that the purpose of these provisions was the preservation of effective competition within the internal market.[416] Thus, in allowing the transaction to continue, the Treaty's objectives would be set aside as it would harm the freedom of movement in the single market.[417]

While the case shows how mergers can affect the single market, one should still note that mergers do not immediately result in the abuse of dominance.[418] As a reaction, the European Economic Community enacted the ECMR to combat concentrations which have an effect of distorting competition in the single market.[419] The ECMR has since been developed into the European Union Merger Regulation of 2004.[420]

The Regulations created the one-stop shop principle in order to address these activities.[421] This principle is only triggered when a transaction reaches

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413. Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, Case C-6/72, 1973 ECR I-215.

414. *Id.* at 242.

415. *Id.* at 246.

416. *Id.* at 244.

417. *Id.* at 246.

418. Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, whereas cl. para. 3-4, 1989 O.J (L 395) 1 [hereinafter ECMR].

419. *Id.* whereas cl., para. 1 & 5.

420. *See* EUMR, *supra* note 108.

421. *See* ECMR, *supra* note 418, pmbl.

certain thresholds as provided by the regulation. Simply put, the Regulations apply to mergers which impact the market beyond the national borders of one Member State.[422] Additionally, they apply when parties to a merger have activities in different Member States;[423] or when the concentration can only be found in one Member State but has substantial operations in at least one other Member State.[424]

The activities regulated by the instrument reinforces the obligation, among Member States and the Community as a whole, to preserve the principle of free movement and freedom of competition.[425] These two principles are deemed to be indispensable for the further growth of the internal market.[426]

The application of ECMR in the preservation and protection of the internal market from mergers with regional effects has been exhibited in the case of *Gencor*. The case concerns a merger between two entities outside of the internal market.[427] The ECJ, in affirming the decision of the Commission, took time to discuss the teleological relevance of prohibiting mergers with regional effects vis-à-vis the fundamental objectives of the Treaty on European Union.[428] It held that the main purpose of the creation of the Regulation was to ensure that concentrations do not significantly impede competition in the single market in accordance with the Article 3 (3) of the Treaty on European Union.[429]

As discussed, the EU places importance in competition as a key element of its single market. Its relevance can be found not only in its preamble but also in placing the rules of competition (i.e., abuse of dominance and anti-competitive agreements) in its own constitutional framework. The ECJ has

422. ECMR, *supra* note 418, whereas cl., para. 9.

423. *Id.* whereas cl. para. 11.

424. *Id.*

425. EUMR, *supra* note 108, whereas cl., ¶¶ 2 & 6.

426. *Id.* whereas cl., ¶ 2

427. *See Gencor Ltd.*, 1999 ECR II-753, ¶¶ 1-6.

428. *Gencor Ltd.*, 1999 ECR II-753, ¶ 149.

429. *Id.*

acknowledged the importance of competition rules as means to preserve and protect the single market.[430] It has also acknowledged that the regulation of mergers with community dimensions requires for further legislation as well as the creation of the one-stop shop principle.[431]

It is, thus, relevant to examine whether the ASEAN as an economic community should adopt a similar framework (i.e., the one-stop shop principle) in combating mergers which affect the single market. This issue becomes more pressing as the competition laws of each Member State only afford protection against mergers which affect their national economies. Thus, it is equally important to determine whether concurrence of jurisdiction with respect to the exercise of extraterritorial jurisdiction is compatible with the single market principle.

B. Placing the One-Stop Shop Principle in the ASEAN Competition Framework

1. Treaty Interpretation

In assessing whether the one-stop shop principle should be adopted by the ASEAN as an economic community, it is important to determine whether competition is an integral part of creating a single market under the AEC Framework. In order to answer the issue at hand, it is relevant to determine whether the ASEAN treats the interpretation similarly with the EU.

Article 2 of the Vienna Convention on the Law of Treaties (VCLT) defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single document or in two or more related instruments and whatever its particular designation[.]" [432] The VCLT applies regardless of the name of the international agreement provided that it falls within the definition of Article 2 of the Treaty.[433] This means that the rules on treaty interpretation apply to

430. *See* EUMR, *supra* note 108, whereas cl., ¶ 6.

431. *See* EUMR, *supra* note 108, whereas cl., ¶¶ 6-8.

432. Vienna Convention on the Law of Treaties art. 2, *signed* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

433. RICHARD GARDINER, TREATY INTERPRETATION 20 (2008).

agreements that regulate the conduct between States and even the relations between persons and States.[434]

Articles 31 to 33 of the VCLT, on the other hand, provide for the general rules of interpretation of treaties.[435] These three articles provide for the three basic approaches of treaty interpretation.[436] The first approach looks into the text of the agreement and focuses on how the words are used.[437] The second approach focuses on the intention of the parties in concluding the agreement.[438] The last approach, on the other hand, focuses on looking at the object and purpose of the agreement as the basis of understanding the treaty.[439]

Article 31 of the VCLT, in particular, discusses the fundamental rules of interpretation which has been argued to be the codification of rules in customary international law.[440] It takes the first approach in interpreting treaties on the text itself. The provision explains that treaties as defined by the VCLT are to be interpreted in good faith according to the ordinary meaning of its text in context.[441] It also mentions of the use of the treaty's object and purpose in the interpretation of a treaty.[442]

Villiger explains that context is important in determining the ordinary meaning of the text of a treaty.[443] He expounds on this by stating that context is determined from the entirety of an article and includes a treaty's preamble,

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434. *Id.* at 21.

435. SHAW, *supra* note 268, at 933.

436. *Id.* at 934.

437. *Id.* at 932.

438. *Id.*

439. *Id.*

440. SHAW, *supra* note 268, at 933 (citing VCLT, *supra* note 432, art. 31).

441. VCLT, *supra* note 432, art. 31 (1).

442. *Id.*

443. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 427 (2009).

annexes, and the other means mentioned in the provision[444] (e.g., the use of agreements made between all parties in connection with the conclusion of the treaty).[445] There is a caveat in the use of the treaty's object and purpose. Villiger explains that a treaty's object and purpose should only be limited to the text of the treaty itself.[446]

One of the reasons for the formalization of the ASEAN as a region was for the purpose of creating a single market and production base which is "highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services[,] and investment ... ."[447] Based from what Article 31 has stated, the phrase "highly competitive" seems to be an element of creating a single market and production base.

While the provision cited this connection, the Charter seems to be silent with regard to what the phrase "highly competitive" means. Thus, in keeping with the general rules of interpretation under Article 31, the Author finds it relevant to look into the treaty's "object and purpose" behind the formalization of the ASEAN through the Charter.

The use of the treaty's object and purpose plays part in the "interpretation of constitutions of international organizations and other multilateral, 'legislative' conventions."[448] From here, the "object and purpose" of a treaty can traditionally be found in the preamble of a treaty or in its general clauses.[449] The International Law Commission has cited the case of *United States Nationals in Morocco*[450] in discussing the relevance of the preamble to the "object and

444. *Id.*

445. VCLT, *supra* note 432, art. 31 (2). *See also* VCLT, *supra* note 432, art. 31 (3).

446. VILLIGER, *supra* note 443, at 428.

447. ASEAN Charter, *supra* note 10, art. 1, ¶ 5.

448. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, 256 (July 8).

449. VILLIGER, *supra* note 443, at 428.

450. Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.) 1952 I.C.J. 176 (Aug. 27).

purpose" of a treaty.[451] There, the Permanent Court held that the preamble contains the statement of the object and purpose of the treaty in interpreting a particular provision.[452] It ruled that the "principle of economic liberty without inequality" found in the preamble must be related to treaty provisions on trade and equality of treatment in economic matters.[453]

In using the principle of using the preamble to determine the relevance of the phrase "highly competitive" in the single market and production base, the Author would like to direct the reader's attention to two paragraphs in the Charter's preamble. There, the Charter mentions the need for regional solidarity to realize an ASEAN Community that is "economically integrated ... in order to effectively respond to current and future challenges and opportunities."[454] Further, the preamble then shows the AMS having been committed in "intensifying community building through enhanced regional integration and cooperation" through the establishment of the ASEAN communities."[455]

Looking at the words of the preamble, one can observe that the goal of the formation of the single market and production base is aimed to make a regionally and economically integrated community. Such observation is further supported by the fact that the single market and production base is not only characterized to be highly competitive but also as economically integrated.[456] From the discussion alone, one can conclude that to achieve economic and regional integration, the single market and production base also needs to be highly competitive.

The use of the Charter's preamble has shown the relevance of competition in the single market framework to attain the goal of regional integration. These observations, however, still seem insufficient in defining what the

451. Seventeenth Session of the International Law Commission, Monaco, Jan. 3-28, 1966, *Report of the International Law Commission on the work of the second part of its seventeenth session*, U.N. Doc. A/6309/Rev.1, at 221.

452. U.S. Nationals in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 184 (Aug. 27).

453. *Id.* at 183.

454. ASEAN Charter, *supra* note 10, pmbl. & ¶ 11.

455. *Id.* pmbl., ¶ 12.

456. *Id.* art. 1, ¶ 5.

phrase "highly competitive" means in relation to the single market goal of the ASEAN Charter.

As previously discussed in this Chapter, the interpretation of a treaty's object and purpose is limited to the text of the treaty itself. This does not mean that there is no further recourse in understanding what is meant for a highly competitive single market and production base and its importance in the single market.

Aside from looking into the treaty's context, and its object and purpose, Article 31 also allows the use of subsequent agreements or practices in understanding the context of the treaty.[457] Such subsequent agreement may relate to the implementation of the treaty or even as a guide for interpreting terms found within the treaty.[458]

Subparagraph 2 of the Article is concerned with the interpretation of the substantive provisions of a term in a treaty.[459] Under subparagraph 2(a) of Article 31, Villiger clarifies that the use of the term "agreement" should be appreciated in a broader perspective to include a treaty as defined by Article 2 of the VCLT or even agreements not made in written form.[460]

On the other hand, subparagraph 3 (a) of Article 31 similarly allows for the use of subsequent agreements between members of a treaty regarding the interpretation of the treaty or the application of its provisions.[461] It can be differentiated from subparagraph 2 of Article 31 as subparagraph 3(a) originates after the conclusion of the treaty.[462] Subparagraph 2 of the treaty refers to agreements made in "some connection with the conclusion of the treaty."[463]

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457. VCLT, *supra* note 432, art. 31 (3). *See* SHAW, *supra* note 268, at 934.

458. VILLIGER, *supra* note 443, at 430.

459. *Id.* at 429.

460. *Id.* at 430.

461. VCLT, *supra* note 432, art. 31 (3) (a).

462. VILLIGER, *supra* note 443, at 431.

463. *Id.* at 429.

In applying these provisions to the present analysis, the most applicable instruments in satisfying the importance of competition in the single market are the AEC Blueprints. Through the first Economic Blueprint, the AMS have recognized that the Blueprint shall be used to transform the region as a single market and production base as defined in the ASEAN Charter.[464] The second Economic Blueprint further supports the first Blueprint's function by recognizing the latter's implementation and continuance.[465]

Given that the relationship demonstrated between the Blueprints and the ASEAN Charter, the Author shall proceed to unveil the emerging importance of competition in the single market. Similarly, there will also be an opportunity to discuss what it means to be a highly competitive region.

In the process of creating a link between competition and the formation of the single market, it is necessarily important to determine what the phrase "highly competitive" means. The first Blueprint does not provide for any definition of what it means to be "highly competitive." Rather, it shows how competition policy is an element of such characteristic.[466] The Blueprint mentions that the objective of competition policy is to ensure the existence of fair competition.[467] The second Blueprint presents a better understanding of what a "competitive" ASEAN means. It explains that a competitive region provides all firms with an equal playing field through an effective competition policy.[468]

These phrases should not to be taken in isolation. Instead, they should be used to determine how competition is associated with the single market object of the Charter. Phrases such as "a single market and production base"[469] in the first Blueprint and "a highly integrated and cohesive economy"[470] in the second Blueprint are also to characterize the ASEAN Economic Community.

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464. ASEAN, AEC BLUEPRINT 2015, *supra* note 14, ¶ 1.

465. ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶¶ 1–3.

466. ASEAN, AEC BLUEPRINT 2015, *supra* note 14, ¶ 41.

467. *Id.*

468. ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 26.

469. *Id.*

470. ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 3.

An important relationship between these characteristics of the AEC has been demonstrated by the fact that the instruments themselves refer to these characteristics as mutually reinforcing and inter-related.[471] The use of those words would mean that, indeed, competition plays an important role in achieving the goal of regional economic integration as espoused by the Charter. This observation is further evinced as the second Blueprint describes the ASEAN as a "competitive region with well-functioning markets[.]"[472] Moreover, the second Blueprint lays emphasis that the proscription of anti-competitive conduct is essential for the unification and liberalization of the single market and production base.[473]

Other than the application of the tools for interpretation under Article 31, the VCLT similarly allows for the application of Article 32. Article 32 of the VCLT allows for the use of supplementary means of interpretation when the interpretation based from Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[474] Examples of supplementary instruments include the use of preparatory work of the treaty such as statements and observations, negotiations records, and minutes of the proceedings.[475]

As regards the preparatory work used in the drafting the ASEAN Charter, attention should be placed in the preparation of the Charter's draft. It has been reported that the High-Level Task Force (HLTF) tasked with preparing the draft has made study visits in Berlin and Brussels on March 2007.[476] There, half of the participants made mention that the EU was considered as a functional reference with regard to regional integration.[477] It has also been

471. ASEAN, AEC BLUEPRINT 2015, *supra* note 14, ¶ 8. *See also* ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 3.

472. ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 26.

473. *Id.*

474. VCLT, *supra* note 432, art. 32.

475. VILLIGER, *supra* note 443, at 445.

476. Reuben Wong, *Model power or reference point? The EU and the ASEAN Charter*, 25 CAMBRIDGE REV. OF INT'L AFFAIRS 669, 674 (2012).

477. *Id.*

reported that the Eminent Persons Group (EPG) have also received meetings with the EU which have influenced them in their recommendations for the ASEAN Charter.[478] Moreover, the ASEAN officials have claimed that they have carefully considered the developments in the EU to avoid its pitfalls and problems.[479] Some argue that these statements show that the ASEAN has clearly modelled its economic integration provisions to that of the EU to attract more investments.[480] The act of patterning the provisions aimed to show semblance of an economically integrated region.[481]

The conduct of both groups shows that they drew inspiration of regional economic integration from the EU. Coming from the observation that both the HLTF and EPG drew reference in drawing up the drafts that we now know as the ASEAN Charter, the understanding of the relationship between competition and the single market can now be further clarified. While taking reference points from the EU, not all the provisions in the Charter are clear to understand.

As previously discussed in this Chapter, the EU places importance on the observation of competition in the creation of the single market through legislation and its court decisions. The preamble of the TFEU recognizes the need to remove barriers through concerted action to allow for fair competition. [482] This meant that the single market should have an environment where all undertakings have the capacity to compete with other undertakings in the Union.[483] Thus, the EU has been granted by the same Charter to create competition rules for the proper functioning of the internal market.[484]

On the matter of jurisprudence, the ECJ made a great deal about ruling upon cases where distortion of competition can lay waste to the efforts of

478. *Id.* at 675.

479. *Id.* at 674.

480. *Id.* at 677.

481. *Id.*

482. TFEU, *supra* note 325, pmbl.

483. *Id.* art. 32 (b).

484. *Id.* art. 3 (b).

creating a single market. As a matter of emphasis, the ECJ has struck down a merger having anti-competitive effects in the internal market, which has not in any way been perfected in the EU.[485]

In a similar way, the ASEAN Charter and the corresponding Blueprints have placed similar emphasis on the importance of competition for the creation of the single market and production base. As discussed in this Chapter, the Charter, in its purpose, describes the single market and production base as highly competitive.[486] This relationship has been further emphasized in the Blueprints by making the single market and production base characteristic and highly competitive region characteristic mutually reinforcing and interrelated.[487]

The importance of regulating competition in the creation of the single market are both seen in both the EU and the ASEAN. On one hand, the EU placed rules on competition to ensure that competition in the single market is not distorted to allow undertakings in the Union to all have competitive capacities.[488] Similarly, the ASEAN, through its Blueprints, has defined a competitive region as a region which allows all firms to be in an equal playing field for the development of well-functioning markets.[489]

From the discussion, the Author is firm in stating that regulating anti-competitive conduct with regional effects is significant in connection to the creation of the single market. While the terminology and phrasing between the two systems may seem different, the intent of both regions seem otherwise inter-related. As discussed, the use of Article 31 of the VCLT has demonstrated that regulating conduct which distorts competition in the single market is necessary to achieve the goal of regional integration. On the other hand, the use of Article 32 of the same instrument has validated the real relationship of competition in the formation of the single market and production base. As illustrated, it is relevant to view what "highly

485. *See generally Gencor Ltd.*, 1999 ECR II-753, 759.

486. ASEAN Charter, *supra* note 10, art. 1, ¶ 5.

487. *See generally* ASEAN, AEC BLUEPRINT 2015, *supra* note 13 & ASEAN, AEC BLUEPRINT 2025, *supra* note 158.

488. *See generally* TFEU, *supra* note 325.

489. ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 26.

competitive" meant in view of the goal of the creation of the single market. The attitude of the ASEAN with regard to competition should be attributed to how the EU values competition in its single market. This is true as both the ASEAN and the EU have the goal of creating a single market in light of regional economic integration.

2. Compatibility of Concurrence of Jurisdiction due to the Exercise of Extraterritorial Jurisdiction with the Principle of Free Movement

As shown in the previous Chapter, the extraterritorial nature of competition laws based on the effects, single economic unit, and implementation doctrines are accepted practices in the international community. This has been justified by the ICJ showing that these doctrines fall under the objective territoriality principle under international law.[490]

The exercise of extraterritorial jurisdiction by each AMS, however, has a problem, which has been presented by the Author in the second Chapter due to varying standards used by each Member State in regulating a merger.[491] It is exacerbated by the existence of different notification regimes in each respective Member State.[492]

As compared to its theoretical reference (the EU), the ASEAN, through the AEGC, has proposed the formation of a regional cooperation agreement in order to address the rise of cross-border mergers and acquisitions in the region. While providing for a humble approach towards formalizing the ASEAN competition framework, this band-aid solution can still create conflicts between and among the AMS due to conflicts of laws and decisions. In order to properly assess the regional cooperation framework proposed by the AEGC, the Author shall use the framework proposed by *Timberland* and *Hartford*, as implicitly acknowledged by the EU in *Gencor*.

It has been argued that the Conflicts of Law under the *Restatement (Third) of Foreign Relations Law of the United States* (Third Restatement) provides for a

490. SHAW, *supra* note 268, at 654.

491. *See* Chapter II of this Note on Merger Control.

492. *Id.*

better understanding in avoiding jurisdictional conflict.[493] The Third Restatement espouses the use of minimum contacts, comity, and the balancing of state interest in determining which jurisdiction should have the best claim to deter anti-competitive mergers.

In order to better understand the application of these principles, the Author shall discuss the following hypothetical scenarios:

(1) Scenario A: Firm A acquires Firm B. Firms A and B are both found in one jurisdiction, AMS 1, and export to another territory, AMS 2.

(2) Scenario B: Firm A acquires Firm B. Firm A is located in AMS 1 while Firm B is located in AMS 2.

(3) Scenario C: Firm A acquires Firm B. Firms A and B are both found in one jurisdiction, AMS 1, and have subsidiaries in AMS 2.

(4) Scenario D: Firm A acquires/mergers with Firm B. Firms A and B are not located in the ASEAN but both firms have subsidiaries in the region.

The minimum contacts principle requires that there be a substantial, direct, or foreseeable effect on the domestic market as a means to justify the application of a States' competition law.[494] It is the Author's view that in using the minimum contacts principle, each respective AMS under each scenario has the jurisdiction to enforce their merger control regimes in all four transactions.

Under Scenario A, AMS 1 and 2 can acquire jurisdiction over the transaction following the implementation doctrine. Similar to Scenario A, Scenario B allows AMS 1 and 2 to exercise jurisdiction over the transaction under the implementation doctrine for Firm A is located in AMS 1 while Firm B is located in AMS 2. Under Scenario C, both AMS 1 and 2 have jurisdiction over the transaction; with AMS 1 having jurisdiction based on the territoriality

493. Karl M. Meessen, *Competition of Competition Laws*, 10 NW. J. INT'L L. & BUS. 17, 25 (1989).

494. Restatement (Third) of Foreign Relations Law of the United States, § 415 (1987).

principle and AMS 2 having jurisdiction based on the single economic unit doctrine. Under the last scenario, any AMS with subsidiaries can have jurisdiction over the transaction under the single economic unit doctrine. In the same scenario, an AMS not having subsidiaries may still acquire jurisdiction using the effects doctrine when it can show substantial effects to a competitor found in its territory under a relevant regional or global geographic or product market.

The next principles to be considered for the conflicts of law analysis is the reasonableness or comity principle and the balancing of state interests principle.[495] The Author shall assess the two principles simultaneously as these have been used interchangeably in the case of *Timberland*, *Hartford*, and *Gencor*. Under these principles, the interests of competing jurisdictions are accessed and weighed accordingly.[496] In applying these principles to competition enforcement and in the present scenario, AMS 1 may request from AMS 2 to either defer or investigate on the anti-competitive conduct.

While these principles would reduce conflicts between and among merger control regimes, their limitations outweigh the conflict to be averted. First, the comity analysis, through balancing of interests, is only done on a voluntary basis and is thus not binding on another jurisdiction.[497] Further, the duty to observe the principle of comity has no binding and obligatory force.[498] These observations have been expressly pronounced by the ECJ in the case of *Gencor*, where it held that the rules on conflicts of jurisdiction are not applicable under public international law.[499]

Moreover, it should be observed that States have differing economic conditions, which is present in the ASEAN Region.[500] This means that it

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495. *Id.* § 403.

496. Meessen, *supra* note 493, at 26-27.

497. Sweeney, *supra* note 298, at *39.

498. Hariff Ahamat & Nasarudin Abdul Rahman, *Closer Cooperation and Coordination in Competition Regulation in ASEAN and their Impact on Trade Liberalization*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 543, 552 (2013).

499. *Gencor*, 1999 ECR II-753, 788.

500. *See* ASEAN, REGIONAL GUIDELINES, *supra* note 77, at ¶¶ 1.2.1, 1.3.1, & 2.2.5.

would be difficult to properly weigh the interest of each Member State in an objective manner due to varying economic conditions.[501]

As stated, a "true conflict" may only arise when the anti-competitive act is made legal under the laws of one State and illegal in another State.[502] This means that the affected State shall inhibit itself from exercising jurisdiction over the transaction.[503]

As shown through the following scenarios, the current framework sought to be enforced cannot be compatible with the principle espoused by the ASEAN single market — the principle of free flow of goods, services, and investment.[504] Indeed, the goal of having a competitive region has been achieved through the enactment of competition laws in each AMS. Nevertheless, the lack of foresight leaves the single market in a very awkward situation.

While competitiveness may be attained through the regulation of market activity, incentives for multinational ASEAN or non-ASEAN firms are hampered by the lack of consistent or uniform standards across the region (i.e., differences in substantive tests and notification requirements).[505] The inconsistencies between the standards of the AMS competition laws lead to a conflicts of jurisdiction scenario creating concurrences of jurisdiction between and among the AMS — causing legal uncertainty in the AEC.[506] The existence of legal uncertainty would mean that compliance cost by a multinational firm would be high as it has to adjust its activities to tailor-fit

501. Sweeney, *supra* note 298, at *86.

502. *See Gencor*, 1999 ECR II-753, ¶ 103.

503. Sweeney, *supra* note 298, at *71.

504. Ahamat & Rahman, *supra* note 498, at 561.

505. Casey Lee & Yoshifumi Fukunaga, ASEAN Regional Cooperation on Competition Policy (A Discussion Paper Published Online by the Economic Research Institute for ASEAN and East Asia) at 13, *available at* http://www.eria.org/ERIA-DP-2013-03.pdf (last accessed Nov. 30, 2019).

506. Lawan Thanadsillapakul, *The Harmonization of ASEAN Competition Laws and Policy and Economic Integration*, 9 UNIF. L. REV. 479, 490 (2004).

the requirements of AMS.[507] As possible divestiture is a reality that may be faced by merging firms, there is also the possibility of discontinuing business in a State where there has been a decision denying such transaction.

Such scenario, while hypothetical, can be counter-intuitive despite the formalization and operation of the single market and production base. The freer flow of goods, services and investments in the ASEAN Region, while competitive, would be deemed fruitless. This is due to the legal uncertainties created by varying merger regulations throughout the ASEAN region. As discussed by the Author, the ASEAN single market with its principle of free flow of goods, services, and investments was made to attract more foreign direct investments in the Region.[508] Thus, through the ATIGA, AFAS, and ACIA as well as through the different goals in the ASEAN Economic Blueprints, the ASEAN aimed to remove trade barriers which included tariff and non-tariff barriers.[509] The difference in judgments between AMS competition authorities through concurring jurisdictions has been argued to be a barrier to the principle of free flow of goods, services, and investments as it creates legal uncertainties as regards to the entry of businesses within the single market.[510] Thus, the Author submits that it is necessary to develop a proper regional framework to address the legal uncertainties produced by the scenarios presented in this chapter.

3. Defining the Rules on Cross-Border Merger Control in a Single Market

As the exercise of extraterritorial jurisdiction with regard to antitrust cases has been clarified to be fully consistent under public international law and thus, not subject to the normal rules of conflicts of jurisdiction, the next question remains — how are conflicts of jurisdiction issues resolved in a single market? The Author shall use the EU as an example in exhibiting how anti-

507. Sweeney, *supra* note 298, at ⋆51.

508. SEVERINO, *supra* note 5, at 44-48 & Association of Southeast Asian Nations, Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23-24 July 1993, ¶ 23, *available at* https://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993 (last accessed Nov. 30, 2019).

509. *Id. See also* Tabbada & Bano, *supra* note 5, at 126.

510. Thanadsillapakul, *supra* note 237, at 490.

competitive activities with transnational effects are resolved in a region, being the most regionally integrated community in the world.

The EU relies on the provisions of the TFEU to regulate acts constituting as abuse of dominance or anti-competitive agreements. Under Articles 101 and 102 of the current treaty, the EC has jurisdiction over acts affecting the trade between Member States and have an effect of distorting competition in the single market.[511] In order to fully implement the provisions, the EU enacted EU Regulation 1/2003.[512] The regulation created a mechanism where national competition authorities are required to halt in reviewing anti-competitive activities when the EC has similarly acquired jurisdiction over the activity.[513]

The development of this regulation can be traced from the case of *Walt Wilhelm* where the ECJ held that the EC and its Member States are allowed to enforce competition laws concurrently, provided that a Member State's law is consistent with the Community law.[514] The shared competences between EC and the Member States was reversed in the case of *Masterfoods*. There, the ECJ ruled that national authorities should stay its proceedings in cases where the decision of the national authority would be inconsistent with the findings of the Commission.[515] On the other hand, the establishment of competition rules was changed in the TFEU. The TFEU removed the shared competences with regard to competition and vested exclusive competence to enact rules to the EC.[516]

On the other hand, regional merger control is currently regulated by the EU Merger Regulation (EUMR). The EUMR traces its creation from the ECMR enacted by the European Economic Communities in 1989.[517] These

511. TFEU, *supra* note 325, arts. 101-02.

512. *See* Council Regulation No 1/2003, pmbl., 2003 O.J. (L 1) 1, 1-7.

513. *Id.* art. 3.

514. Walt Wilhelm & others v. Bundeskartellamt, Case 14/68, 1969 ECR 2, 14.

515. Masterfoods Ltd. v. HB Ice Cream Ltd, Case C-344/98, 2000 ECR I-11369, 11430.

516. TFEU, *supra* note 325, art. 3.

517. EUMR, *supra* note 108, pmbl.

documents are intended to regulate concentrations with a Community dimension.[518] In order to determine whether a concentration is perceived to be with a Community dimension, the regulation provides for thresholds which are based on quantifiable amounts (e.g., total aggregate turnover).[519] If such concentration reaches those thresholds, jurisdiction over the transaction shall be solely vested to the EC to the exclusion of the exercise of jurisdiction by national competition authorities.[520] This bar from the exercise of jurisdiction does not exist in cases where the concentration's effects are only limited within the territorial jurisdiction of a Member State; or when the concentration does not meet the thresholds placed by the EUMR.[521]

The jurisdictional allocation provided by the EUMR is derived from the EU principle of subsidiarity.[522] The principle of subsidiarity finds itself related to the word "subsidiary" which means "serving one to help, assist, or supplement."[523]

It has been argued that the principle of subsidiarity has two functions under international law.[524] The first function serves to qualify a State's exercise of its jurisdiction through the need of a particular connection to the forum

518. *See* ECMR, *supra* note 418 & EUMR, *supra* note 108.

519. EUMR, *supra* note 108, art. 1, ¶ 3.

520. *Id.* whereas cl., para. 9-10.

521. *Id.*

522 *Id.*

523. GERALD L. NEUMAN, SUBSIDIARITY, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW, 361 (2013) (citing Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 HOKKAIDO L. REV. 553, 646 (1994)). It can be traced from Catholic Social Teaching as a means to preserve the autonomy of smaller institutions from unnecessary intervention of larger institutions such as the State. *Id.* Another possible source of the principle can be traced from the philosophical teachings of Aristotle. *Id.*

524. Cedric Ryngaert, Subsidiarity and the Law of Jurisdiction, (Unpublished Paper for the Utrecht University School of Law, Netherlands), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523327 (last accessed Nov. 30, 2019).

State.[525] It also provides for the same function for the forum State to defer the exercise of its jurisdiction in favor of other States which have a stronger connection over the activity.[526] The second function, on the other hand, arms a bystander State, who is not affected by the concerned activity, with the power to exercise jurisdiction over the said activity.[527] Such exercise of jurisdiction relies on the need for the protection of global public goods or values for the failure of a State with a stronger connection to the act, to address it.[528]

Ryngaert distinguishes the two functions either as a negative or positive aspect of the principle. He describes the first function as the negative aspect of the principle based on the Westphalian concept of States.[529] Under the Westphalian understanding, States are only granted the power to exercise their sovereignty within the boundaries of their territories;[530] thus, they do not have any competence in exercising sovereignty over the acts done beyond their territory.[531] This understanding of the principle, in effect, prevents the interventionist tendencies[532] of States.[533] On the other hand, the positive aspect of the principle illustrates how the concept of sovereignty of States, instead of protecting global values, can bring more harm to the international community.[534]

Neuman, on the other hand, describes the principle as a "relationship between two institutions or norms, by which one supplements the other in

525. *Id.* at 2.

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

530. Ryngaert, *supra* note 524, at 2.

531. *Id.*

532. *See generally Hartford*, 509 U.S. 764.

533. Ryngaert, *supra* note 524, at 2.

534. *Id.*

appropriate circumstances."[535] He explains that the description enables the application of the principle in a broad range of functions including the distinctions formulated by Ryngaert.[536]

While appearing similar to the distinctions provide by Ryngaert, Neuman takes a turn by looking at a vertical application of the principle between a higher institution and a lower institution. Neuman illustrates this understanding of subsidiarity through the EU principle of subsidiarity where the EU can only exert its powers when an action of its individual members would be incapable of achieving the purpose of the action.[537]

In essence, the principle of subsidiarity serves as a balance between the original notion of State sovereignty and consent, and the gravitation towards the emphasis of shared community or global values and goals.[538]

The relationship between the EC and national courts was established in *Stergios Delimitis v. Henniger Bräu*.[539] The case allowed the ECJ to specify factors to consider as to when the EC can exclusively exercise its jurisdiction over anti-competitive acts. The ECJ ruled that the conflicting decisions between two authorities would be contrary to the general principle of legal certainty.[540] Thus, it held that the EC is the only institution capable of dealing with highly complex cases.[541]

Lang, a legal advisor to the EU, categorized the previous ECJ decisions that considered activities to be highly complex as characterized by *Delimitis* as follows:

> (1) [W]here corporations have allegedly infringed the Treaty in two or more Member States;

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535. Neuman, *supra* note 523, at 361.

536. *Id.*

537. *Id.*

538. Ryngaert, *supra* note 524, at 3.

539. Stergios Delimitis v. Henninger Bräu AG, Case C-234/89, 1991 ECR 1-935, ¶¶ 44-48.

540. *Id.*

541. *Id.* ¶ 47.

(2) [W]here the economic issues are difficult, or the final remedy has far-reaching impact requiring effective uniformity throughout the Common Market;

(3) [W]here government state enterprises are involved; or

(4) [W[here mergers or joint ventures are involved, especially when divestiture in more than one Member State is at issue.[542]

Alford, on the other hand, argues that the pronouncement of the ECJ suggests that the national competition enforcement cannot be effective save for uncomplicated cases.[543] He posits that national competition authorities are only capacitated to adjudicate on straightforward anti-competitive acts such as *per se* anti-competitive conduct.[544] He, however, reiterates that the decision minimizes the issues over conflicting competition rules.[545]

The characterizations of Lang, in illustrating what highly complex cases are, should be considered synonymous in the present problem. Similar to the characterizations by Lang from the cases of the ECJ, the mergers contemplated by the Author refer to mergers which can create effects beyond the borders of one AMS. Due to the extraterritorial effects of these mergers, AMS may unilaterally exercise their jurisdiction extraterritorially again creating conflicts of jurisdiction. As previously argued, public international law does not recognize a conflicts of jurisdiction approach; thus, allowing an AMS to exercise jurisdiction without any concern with the other AMS due to differing economic interests and conditions of each AMS.[546] Such circumstance falls squarely under the characterizations illustrated by Lang. This clearly shows a need to address the problem within a regional merger control framework.

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542. Roger P. Alford, *Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws*, 27 CORNELL INT'L L. J. 271, 282 (1994) (citing John Temple Lang, *EEC Competition Actions in Member States' Courts—Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law*, 7 FORDHAM CORP L. REV. 389, 413-14 (1983)).

543. Alford, *supra* note 542, at 282.

544. *Id.*

545. *Id.*

546. Sweeney, *supra* note 298, at *57.

4. Setting Up a Regional Merger Control Framework

In case the activity does not fall under the characterizations clarified in this Chapter, what would be the possible remedy in cases of conflicts of jurisdiction? As illustrated in this Chapter, different approaches in cross-border merger regulation can be applied by a single market to avoid conflicts of jurisdiction. Thus, the Author submits that it is important to ensure that the different approaches do not conflict with each other. The Author submits that the first level of determining whether a merger is considered as a merger with a "Community dimension" involves the application of the EUMR one-stop shop principle.[547] There, quantifiable thresholds shall be used to determine such characterization (e.g., total assets or total turnover of the merged entity).

Failing to meet the thresholds, nevertheless, does not immediately mean that a merger shall be considered outside of what a merger with a "Community dimension" means. The characterizations, as summarized by Lang, shall be referred to in determining whether jurisdiction shall still be obtained at the regional level.[548]

In the event that a merger does not meet both quantitative and qualitative standards, the "true conflicts" test as defined in the cases of *Hartford* and *Gencor* shall be used.[549] The test means that the exercise of jurisdiction by an affected State shall be barred when it can be shown that the forum State of where the merger was done finds the transaction legal under law.[550]

The rules articulated in this Chapter are presented in the matrix below:

Level	Standard to be used	Effect
First Level: The Application of the One-Stop Shop Principle	Quantitative standards (e.g., total market shares, total asset turnovers, total sales turnovers) shall be used in determining whether a merger is deemed to have regional effects.	The merger shall be resolved in a regional level. The merger will be removed from the domestic jurisdiction of the AMS.

547. *See generally* EUMR, *supra* note 108.

548. Lang, *supra* note 542, at 413-14.

549. *See Hartford*, 509 U.S. at 820-21 & *Gencor Ltd.*, 1999 ECR II-753, ¶ 103.

550. *Id.*

Level	Standard to be used	Effect
Second Level: The Application of Lang's Criteria	When the merger does not meet the regional thresholds determined by the Region, the application of the criteria determined by Lang (e.g., where the economic issues are difficult or the final remedy has far-reaching impact requiring effective uniformity throughout the Common Market) shall be used to determine whether the merger has regional effects.	The merger shall be resolved in a regional level. The merger will be removed from the domestic jurisdiction of the AMS.
Third Level: The Application of the "True Conflicts" test	When both the first and second level tests do not apply, the "true conflicts" test defined in *Hartford* and *Gencor* shall be used.	Jurisdiction shall be exercised exclusively by the State which made the merger legal under law. This shall bar the affected State from exercising jurisdiction.

VI. CONCLUSION AND RECOMMENDATION

A. Conclusion

It is clear that the ASEAN aims to achieve regional economic integration by creating two Economic Blueprints, as a means to implement the ASEAN Charter's overarching goal of regional integration. To achieve this goal, it was essential to ensure that a creation of a single market and production base be created among the AMS.

Crucial to the creation of this single market and production base relates to ensuring that competition in the region is not distorted by anti-competitive activities. Thus, the AMS has enacted competition laws to combat deleterious effects in their respective jurisdiction. The enactment of these laws, however, created different standards and systems which the AMS was allowed to adopt due to the non-binding nature of the Guidelines on competition law and policy.

As a consequence of enacting competition laws, most, if not all, of the AMS inserted long-arm statutes which aimed to regulate anti-competitive conduct outside its borders. The insertion of long-arm statutes in competition

laws, however, has been presented to create conflicts of jurisdiction due to the transnational nature of cross-border mergers. In relation to this problem, it has been submitted that the use of comity analysis is frowned upon by US and EU jurisprudence as these rules do not create any binding obligation for States to observe.

On the other hand, the relationship between competition and the principle of free movement are understood to be complementary to each other. The ECJ cases and other EU regulations have repeatedly placed importance on the necessary relationship between competition and the freedom of movement. Similar to the EU, the ASEAN has also contemplated such relationship between competition and the single market principle through the use of treaty interpretation. Such conduct shows how the ASEAN values both the regulation of competition and the single market principle as mutually enforcing and interrelated characteristics needed for regional economic integration.

The mutually enforcing nature of freedom of competition and the free flow of goods, however, needs to be balanced. This is due to the fact that the concurrence of jurisdiction in merger control due to differing standards is incompatible with the principle of free flow of goods. The principle of free movement or free flow of goods in the ASEAN requires that barriers to entry to the single market among AMS are to be eliminated. This means the elimination not only of tariff barriers but also of non-tariff barriers as well.

While it is submitted that the enactment of competition laws in each respective AMS has contributed to achieve the removal of some barriers to entry, the concurrence of jurisdiction created between and among the AMS hinders goods, services, and investments from entering different AMS. The resulting conflicts create legal uncertainties for businesses, which can lead to a creation of an implicit barrier to entry. Thus, to enable an effective single market, a new framework should be crafted to avoid problems. Failure to do so would go against the intents and purposes of the ASEAN Charter in creating a regionally integrated economy characterized as a highly competitive single market.

The Note has shown that different approaches have been considered in ensuring conflicts of jurisdiction is avoided in cases of mergers with transnational effects within a single market. First, the one-stop shop principle has been created in ensuring that mergers reaching certain thresholds are considered to be mergers that have regional effects. Second, a categorization

of highly complex cases has been defined to determine whether such transaction should be deemed removed from a Member State's jurisdiction. Lastly, a "true conflicts" approach has also been demonstrated to exist only when two laws characterize an act to be both legal and illegal, respectively.

To ensure that these approaches do not come into conflict with each other, it is submitted that as a general rule, the one-stop shop principle following a notification procedure shall be followed in determining whether a merger has regional effects or not. To complement the threshold requirements, mergers characterized to be highly complex using Lang's proposed standards shall similarly be used in regulating mergers.[551] When both approaches are inapplicable, and conflicts of jurisdiction are still present, the "true conflicts" test shall be applied in determining the proper jurisdiction for the regulation of the merger.

B. Recommendations

In order to facilitate the application of the proposed framework for regional merger control, it is submitted that the creation of a regional merger control framework agreement with a regional authority is in order. The Author recommends that the AEC Council, in its capacity to implement the provisions of the AEC Blueprints,[552] be tasked to create the agreement which shall take effect among all the AMS.

The ASEAN Merger Control Agreement,[553] in reflecting the Author's conclusion, will contain a provision with regard to a mandatory notification procedure when a transaction meets the characterization provided for by the agreement. The Author recommends that the provision will read as follows:

Article [XX]. Scope of the regional merger control: This agreement shall cover mergers which have the following criteria:

(a) Where mergers are involved, especially when divestiture in more than one AMS is at issue; or

551. Lang, *supra* note 548, at 413-14.

552. *See generally* ASEAN, AEC BLUEPRINT 2015, *supra* note 13, ¶ 70 & ASEAN, AEC BLUEPRINT 2025, *supra* note 158, ¶ 81.

553. *See* Chapter VII of this Note.

(b) Where the economic issues surrounding a merger is difficult to determine, thus requiring effective uniformity in the single market.

The Author submits that the other characterizations may be considered by the ASEAN merger control authority, in accordance to other factors deemed relevant by the merger authority.

To complement the scope of the regional merger control framework, the Author submits that a mandatory pre-merger notification be placed. To avoid having all mergers going through the notification process, the Author recommends for thresholds to be applied in the regional framework. The Author similarly recommends a voluntary pre-merger notification system to ensure that a merger failing to meet thresholds shall be uninterrupted in its execution. The pre-merger notification system will read as follows:

Article [XX]. Pre-merger notification. Mergers are required to notify the merger control authority of the transaction when the following thresholds are met:

(a) Where the merger shall result in a total market share of [xxx] percent in the relevant market;

(b) Where the merger shall result in combined total assets of [xxx] in the relevant market; or

(c) Where the merger shall result in combined aggregate sales of [xxx] in the relevant market.

Nevertheless, mergers which fail to meet the criteria are allowed to voluntarily notify the transaction to obtain a preliminary ruling from the merger control authority.

For the purposes of this agreement, the relevant market shall be the geographic market of the ASEAN region, in observance of the single market and production base element of the ASEAN Economic Community.

To implement the agreement, it shall also include the creation of a regional merger control authority which shall be composed by ten members represented by each of the ten Member States. This body shall also be tasked to determine the proper market share, assets, and sales thresholds to be used in the determination of mergers required to comply with the mandatory pre-merger notification system. The body shall equally be tasked in determining if a merger is covered by the aforementioned criteria proposed by the Author, when the merger does not fall under the thresholds specified in the agreement.

When the threshold requirements and criteria are not met, the Author recommends that a provision be made to acknowledge the competence of national competition authorities in the review of mergers. The provision will read as follows:

Article [XX]. Role of National Competition Authorities. This agreement acknowledges the importance of national competition authorities in regulating prohibited mergers within their respective jurisdiction. Thus, in cases where the merger falls below the threshold requirements and do not meet the criteria as defined in Article [XX], the national competition authority shall have exclusive jurisdiction over the merger.

This provision shall not apply in cases where two or merging authorities have differing conclusions due to the national legislation making such act legal. In which case, the merger shall be placed under the jurisdiction where the transaction occurred.

To ensure proper enforcement of the agreement, the findings of the regional authority shall be binding among all the AMS which, in turn, shall be implemented by each respective National Competition Authority. The failure to comply with the obligation shall constitute a breach of the agreement which shall subject the erring State to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

Procedurally, the regional authority shall also be tasked to create a Protocol providing for the rules of conduct in merger control cases which include but shall not be limited to the following: the format of merger notification forms, the formation of panels, and rules on appeals.

Lastly, to ensure that the agreement shall be used in full force, the Author recommends that the agreement shall not apply the ASEAN Minus X formula. Under the ASEAN Charter, the use of the ASEAN Minus X formula is merely directory in nature due to the use of the word "may" in its application.[554] Moreover, the Author similarly recommends the use of the Vienna Convention on the Law of Treaties (VCLT) in the interpretation of the agreement. The agreement shall specifically acknowledge the use of Article 30 (3) of the VCLT in reconciling conflicting provisions between the regional merger control agreement and other previously existing ASEAN

554. ASEAN Charter, *supra* note 9, art. 21.

documents.[555] In applying the provision, the regional merger control agreement shall prevail when there exist incompatible provisions between the agreement and the earlier treaties, being the latter treaty between the two.

The recommended provisions of the agreement are based on the Author's conclusion and are in no way exhaustive of the other salient features of the agreement.

On the other hand, as a domestic response to the creation of a regional framework on merger control, the Philippines, in cooperation with the PCC, should amend the PCA to include a provision which refers to the regional merger control framework entered upon by the ten AMS. The amendment to the PCA will read as follows:

Sec. 3. Scope and Application. - This Act shall be enforceable against any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines. It shall likewise be applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines, *except otherwise provided for in treaties, and international or regional agreements.*[556]

On the other hand, the Author recommends that the PCC, in drafting or revising the Guidelines on Mergers, include a provision acknowledging the criteria and notification thresholds defined in the regional merger control framework. The provision will read as follows:

Sec. XX. Mergers with transnational effects — Mergers with transnational effects shall be defined in accordance to the criteria and notification thresholds provided for by the ASEAN Regional Merger Control Framework.

In case the merger shall fall within the criteria and/or notification thresholds based on the ASEAN Regional Merger Control Framework, parties to the merger shall be required to notify its transaction to the regional merger control authority.

The proposed amendments to the Philippine competition policy shall equally apply to the respective domestic legislations of the other AMS.

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555. VCLT, *supra* note 432, art. 30 (3).

556. Philippine Competition Act, § 3.

With the ASEAN Vision of 2025 for an ASEAN Economic Community looms in the horizon as well as the competition laws of the respective AMS ending their transition periods, conflicts of jurisdiction are highly inevitable. It is high time to ensure that conflicts be removed to preserve the integrity of the single market. Thus, all Member States need to cooperate with each other to ensure that trade barriers created implicitly through conflicts be removed for a more prosperous and well-oiled Economic Community.

VII. TEXT OF THE PROPOSED ASEAN MERGER CONTROL AGREEMENT

ASEAN MERGER CONTROL AGREEMENT

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam, Member States of the Association of South East Asian Nations (hereinafter referred to as ASEAN);

Recognizing the importance of competition in the conduct of trade and the flow of investment among the Member States of the ASEAN to ensure an equal playing field for business;

Desiring to foster deeper regional economic integration in ensuring the removal of conflicts in the exercise extraterritorial jurisdiction in order to provide for economic progress, the realization of the ASEAN Economic Community (hereinafter referred to as AEC), and prosperity of the Member States of the ASEAN;

Recognizing the need to create a framework to better facilitate the flow of investments and to encourage ASEAN-business to enjoy the benefits of the single market; and

Recognizing the importance of mergers in fostering an environment which will enhance freer flow of goods, services, capital, technology, and the overall economic development of the ASEAN;

Have agreed as follows:

Article 1. Objectives

The objective of this Agreement is to create a consistent and uniform regional merger regime in ASEAN in order to achieve the end goal of economic integration under the AEC in accordance with the AEC Blueprint, through the following:

(a) The creation of a regional merger control regime to encourage freer flow of goods, services, capital and investment; and

(b) Provision delineating the capacity of regional merger control regime to regulate mergers as defined in this agreement.

Article 2. Guiding Principles

This Agreement shall create a transparent regional merger control framework to encourage freer flow of goods, service, capital and investment adhering to the following principles:

(a) Providing for a transparent merger control regime; and

(b) Providing for uniform and consistent rules to avoid legal uncertainty.

Article 3. Scope of Application

This Agreement shall cover mergers which have the following criteria:

(a) Where mergers are involved, especially when divestiture in more than one AMS is at issue; or

(b) Where the economic issues surrounding a merger is difficult to determine, thus requiring effective uniformity in the single market.

For the purposes of this Agreement, mergers include mergers, acquisitions, joint ventures and interlocking directorates.

Article 4. Pre-merger Notification

Mergers are required to notify the merger control authority of the transaction when the following thresholds are met:

(a) Where the merger shall result in a total market share of [xxx] percent in the relevant market;

(b) Where the merger shall result in combined total assets of [xxx] in the relevant market; or

(c) Where the merger shall result in combined aggregate sales of [xxx] in the relevant market.

Nevertheless, mergers which fail to meet the criteria are allowed to voluntarily notify the transaction to obtain a preliminary ruling from the merger control authority.

For the purposes of this Agreement, the relevant market shall be the geographic market of the ASEAN region, in observance of the single market and production base element of the ASEAN Economic Community.

Article 5. Prohibited Mergers

For the purposes of this Agreement, a merger is considered prohibited when it creates an effect of substantially preventing, lessening, or restrict competition.

Article 6. ASEAN Merger Control Authority

(1) Powers. The ASEAN Merger Control Authority shall have the following powers:

(a) To investigate prohibited mergers in accordance to the provisions of this agreement;

(b) To determine the proper thresholds to be used in the mandatory pre-merger notification requirement;

(c) To request for documents to enable proper findings in merger cases;

(d) To recommend findings which the national competition authorities shall be tasked to execute;

(e) To create the rules of procedure in the adjudication of merger control cases; and

(f) To act in fulfilment of the provisions of this agreement

(2) Composition. The ASEAN Merger Control Authority shall be composed of one representative from each respective ASEAN Member State. The ASEAN Merger Control Authority shall be assisted by highly technical professionals in the exercise of its powers.

Article 7. Rules of Procedure

Upon formation of the ASEAN Merger Control Authority, the body shall be tasked in drafting the Protocol on the ASEAN Merger Control Agreement

covering the rules of procedure to be used by the body and merging entities in the adjudication of merger control cases.

Article 8. Role of National Competition Authorities

This Agreement acknowledges the importance of national competition authorities in regulating prohibited mergers within their respective jurisdiction. Thus, in cases where the merger falls below the threshold requirements and do not meet the criteria as defined in Article 4, the national competition authority shall have exclusive jurisdiction over the merger.

This provision shall not apply in cases where two or merging authorities have differing conclusions due to national legislation making such act legal. In which case, the merger shall be placed under the jurisdiction where the transaction occurred.

Article 9. Enforcement

The findings of the ASEAN Merger Control Authority shall be binding to all the ASEAN Member States. The respective national competition authority of each ASEAN Member State shall be obligated to implement the determination of the ASEAN Merger Control authority. The failure of the national competition authority to comply with the obligation shall constitute a breach of the agreement which shall subject the erring State to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

Article 10. Relation to Other Agreements

This Agreement shall not be covered by the ASEAN Minus-X provision under Article 21 of the ASEAN Charter.

This Agreement shall adhere to the international law principle of auto-limitation.

In case of inconsistency between this Agreement and any prior agreement, this Agreement shall prevail applying Article 30 (3) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Article 11. Annexes, Schedule, and Future Instruments

This Agreement shall include the Annexes and the contents therein, which shall form an integral part of this Agreement, and all future legal instruments agreed pursuant to this Agreement.

Article 12. Amendments

Any provision of this Agreement may only be amended by mutual written agreement by the Heads of State or Government of all ASEAN Member States.

The Agreement shall be reviewed every five years to accommodate to the changing economic conditions of the region. The ASEAN Merger Control Authority shall coordinate with the ASEAN Expert Group on Competition in the review of this Agreement.

Article 13. Accession of New Members

New Members of ASEAN shall accede to this Agreement on terms and conditions agreed between them and signatories to this Agreement.

Article 14. Final Provisions

This Agreement shall be deposited with the Secretary-General of the ASEAN, who shall promptly furnish a certified true copy thereof to each Member State.

This Agreement shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN, which shall not take more than one-hundred and eighty (180) days after the signing of this Agreement.

Article 15. Reservations

No reservations shall be made with respect to any of the provisions of this Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed the ASEAN Merger Control Agreement.

DONE at Makati, this 15th day of August 2017 in a single copy in the English Language.